Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1994

AIRBUS INDUSTRIE, ET AL.,
Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED FOR REVIEW

I. Whether the prohibition contained in 28 U.S.C. § 1447(d) against review of a case that has been remanded to state court applies when the order of remand involves a separable ruling denying a party's claim of immunity from suit under the Foreign Sovereign Immunities Act?

PARTIES

Petitioners are Airbus Industrie, G.I.E. and Aeroformation, G.I.E.[1/] Petitioners are defendants in the underlying litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the appellants and petitioners in the Fifth Circuit appeal and mandamus proceeding from which this petition for writ of certiorari arises.

Respondents are Laura Howell Linton, individually and as the personal representative of the Estates of Andrew Jay Howell and Sarah Stoll Howell, Deceased, and on behalf of Rena Howell, Margaret F. Howell, Nell Jones and any other proper legal beneficiaries of Andrew Jay Howell and Sarah Stoll Howell; Rena Howell, individually, Margaret F. Howell, individually, and Nell Jones, individually; Ratna

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[1/]Petitioner Airbus Industrie is owned by a consortium of British Aerospace PLC; Deutsche Airbus GmbH; Construcciones Aeronautics S.A., and Aerospatiale.

The non-wholly owned subsidiaries of Petitioner Airbus Industrie are: Airbus Industrie of North America Holdings, Inc.; Airbus Industrie of North America, Inc.; Airbus Service Co.; Airbus Industrie Leasing Corp.; Airbus Industrie Leasing II, Inc.; Airbus Industrie Leasing IV, Inc.; Airbus Industrie Leasing V, Inc.; Airbus A300 Leasing, Inc.; Airbus Industrie Leasing VI, Inc.; 128829 Canada, Inc.; Societé Commerciale A300 S.A.; AVSA C.A.R.L.; Airbus Industrie (Bermuda) Ltd.; A300 Finance Ltd.; Widebody Finance I Ltd.; Widebody Finance II Ltd.; Airbus Spares Ltd.; AI Participations S.A.R.L.; Airbus Industrie (Netherlands) B.V.; AIFS Holdings B.V.; Tanja B.V.; Airbus Industrie Ireland Co.; AIFS Holdings Ltd.; Airbus Industrie Financial Services (Ireland); AIFS Company Ltd.; Airbus Industrie Finance B.V.; AIFS Leasing I; AIFS Leasing II.

Aeroformation has been dissolved and therefore has no parent companies or non-wholly owned subsidiaries.

Patel (Vaghjiani) and Valbai Patel (Vaghjiani), individually and as executors and personal representatives of the Estates of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani, Deceased, and on behalf of and as the next friends of Tulsi Vaghjiani and on behalf of Lalji Karsan Vekaria and Kanbai Lalji Vekaria and any other proper legal beneficiaries of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani) as the next friends of Tulsi Vaghjiani, individually, Lalji Karsan Vekaria, individually, and as the executors and personal representatives of the Estate of Rakhee J. Patel, Deceased, and on behalf of and as the next Friends of Deena J. Patel and any other proper legal beneficiaries of Rakhee J. Patel; Neeta J. Patel and Jaisukh A. Patel and as the next best friends of Deena J. Patel, individually; and Mr. & Mrs. Stan Moss, individually and as Temporary Administrators of the Estate of Alison Leslie Moss. Respondents are plaintiffs in the underlying litigation now pending in the United States District Court for the Southern District of Texas, Galveston Division, and were the appellees and respondents in the Fifth Circuit appellate and mandamus proceeding.

The Honorable Samuel B. Kent, Judge of the United States District Court for the Southern District of Texas, Galveston Division, is the Judge before whom the underlying litigation is now pending and was also a respondent in the Fifth Circuit mandamus proceeding pursuant to Federal Rule of Appellate Procedure 21, although his name was not listed as a respondent in the caption in that proceeding pursuant to Fifth Circuit Local Rule 21. Judge Kent was represented pro forma in the Fifth Circuit mandamus proceeding by counsel for the parties opposing the mandamus, Laura Howell Linton et al., Respondents in this Court.

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AIRBUS INDUSTRIE, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Airbus Industrie and Aeroformation (the "Airbus Defendants") respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit dated August 16, 1994. The Fifth Circuit dismissed the Airbus Defendants' appeal and denied their alternative motion to recall the mandate and their petition for a writ of mandamus. The Airbus Defendants had sought review in the Fifth Circuit of the district court's denial of their immunity claim under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1988 & Supp. V 1993), but, because the district court had remanded the case to state court, the Fifth Circuit held that 28 U.S.C. § 1447(d) (1988 & Supp. V 1993) deprived it of jurisdiction to review this denial of immunity.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals dismissing the Airbus Defendants' appeal and denying their alternative motion to recall the mandate and their petition for a writ of mandamus is reported at 30 F.3d 592 (5th Cir. 1994), and is reprinted as Appendix A hereto.

The order of the United States District Court for the Southern District of Texas remanding the case to Texas state court is not reported and is reprinted as Appendix B hereto.

The order of the United States District Court for the Southern District of Texas modifying its order that remanded the case to state court is not reported and is reprinted as Appendix C hereto.

The order of the United States District Court for the Southern District of Texas denying the motion to remand the case to state court is not reported and is reprinted as Appendix D hereto.

The order of the United States District Court for the Southern District of Texas denying the Airbus Defendants' FSIA immunity is reported at 794 F. Supp. 650 (S.D. Tex. 1992), and is reprinted as Appendix E hereto.

The order of the United States District Court for the Southern District of Texas staying its order of remand is not reported and is reprinted as Appendix F hereto.

The order of the United States Court of Appeals for the Fifth Circuit denying the Airbus Defendants' Petition for Panel Rehearing and Suggestion for Rehearing En Banc is not reported and is reprinted as Appendix G hereto.

The judgment of the United States Court of Appeals dismissing the Airbus Defendants' appeal and denying their alternative motion to recall the mandate and their petition for writ of mandamus is not reported and is reprinted as Appendix H hereto.

The order of the United States Court of Appeals for the Fifth Circuit dismissing the Airbus Defendants' prior appeal in this case, Fifth Circuit Appeal No. 92-7564, is not reported and is reprinted as Appendix I hereto.

The order of the United States Court of Appeals for the Fifth Circuit denying the Airbus Defendants' Petition for Panel Rehearing in the prior appeal in this case, Fifth Circuit Appeal No. 92-7564, is not reported and is reprinted as Appendix J hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the August 16, 1994 decision of the United States Court of Appeals for the Fifth Circuit, which dismissed the Airbus Defendants' appeal and denied their alternative motion to recall the mandate and their petition for a writ of mandamus.

On August 30, 1994, Petitioners timely filed a Petition for Panel Rehearing pursuant to Federal Rule of Appellate Procedure 40 and a Suggestion for Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35 in the Fifth Circuit. The Fifth Circuit denied the Petition for Panel Rehearing and the Suggestion for Rehearing En Banc on September 13, 1994. Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1988):

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), (b) (1988):

> **§ 1603. Definitions**
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is

owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1441(d) (1988):

§ 1441. Actions removable generally

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury . . . .

28 U.S.C. § 1447(d) (1988):

§ 1447. Procedure after removal generally

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1291 (1988):

§ 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This case arises out of a crash near Bangalore, India of an Airbus A320 model aircraft, which was assembled by Petitioner Airbus in France and delivered to Indian Airlines in France. The aircraft was then operated by Indian Airlines using Indian crews most of whom had been trained in India by Indian Airlines and some of whom had been trained in France by Petitioner Aeroformation. The crash was investigated in India by Indian authorities.

Despite the complete lack of any connection with the State of Texas, the Plaintiffs instituted two separate actions in state district court in Brazoria County, Texas. Both actions were timely removed to the United States District Court for the Southern District of Texas and consolidated. Jurisdiction for removal was based on two independent grounds of federal court jurisdiction: (1) diversity

jurisdiction under 28 U.S.C. § 1332 because all the United States parties, Plaintiffs, and Defendants, were diverse, and the foreign parties were additional parties; and (2) federal question jurisdiction under the FSIA and 28 U.S.C. §§ 1441(d) and 1330(a) because the Airbus Defendants were agencies or instrumentalities of foreign states. After removal, the Plaintiffs filed motions to remand their respective actions to state court.

The Airbus Defendants filed motions to dismiss, arguing, among other things, that they were agencies or instrumentalities of foreign states as those terms are defined by the FSIA, and, accordingly, were entitled to absolute immunity from suit in the courts of the United States and of the States. Defendants also moved for dismissal on the grounds of *forum non conveniens* and lack of *in personam* jurisdiction.

On July 22, 1992, the district court entered an order (the "FSIA Order"), which held that the FSIA does not apply to the Airbus Defendants because they are not agencies or instrumentalities of foreign states. *Linton v. Airbus Industrie*, 794 F. Supp. 650, 653-54 (S.D. Tex. 1992); Appendix E at E-1 to E-8. The district court's ruling was based on its conclusion that, even assuming that the FSIA permits pooling of interest of several foreign countries to meet the requirement that the entity claiming immunity under the FSIA have "a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof," 28 U.S.C. § 1603(b)(2), the interest of one of the countries at issue—Germany—could not be pooled with the interests of other countries because Germany did not own a majority in the companies through which Germany held its ownership interest in the Airbus Defendants. Appendix E at E-4 to E-7. Absent inclusion of Germany's interest, neither Airbus Defendants had a majority of its

shares owned by a foreign state or states as required by the FSIA. Appendix E at E-4.

From the district court's FSIA Order, the Airbus Defendants timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. That appeal was docketed as No. 92-7564 in the Fifth Circuit.

On February 24, 1993, the Fifth Circuit dismissed the appeal in No. 92-7564, finding that the FSIA Order was not final and therefore not appealable under either 28 U.S.C. § 1291 or the collateral order doctrine. Appendix I at I-1 to I-2. Accordingly, the Fifth Circuit remanded the case to the district court with instructions to rule on Plaintiffs' motions to remand and Defendants' motions to dismiss. Appendix I at I-2.

After the Fifth Circuit dismissed the prior appeal for lack of appellate jurisdiction, the district court initially entered an order denying Plaintiffs' motions to remand and the motion for leave to file an amended complaint, which would have altered the citizenship allegations of the plaintiffs to destroy diversity jurisdiction. Appendix D at D-1 to D-10.

After some of the parties in the district court entered into a stipulation regarding the residency and travel patterns of certain plaintiffs and individuals whose estates they represented in order to clarify some of the background factual issues related to the *forum non conveniens* motion, the district court, *sua sponte*, readdressed Plaintiffs' motions to remand and concluded that (i) it lacked personal jurisdiction

over the Airbus Defendants[2/] and (ii) if it could exercise jurisdiction over the Defendants, it would dismiss the action for *forum non conveniens*. Appendix B at B-2. The district court also determined that it lacked subject matter jurisdiction because, although diversity jurisdiction properly existed at the time of removal, the postremoval stipulation divested the district court of diversity jurisdiction. Appendix B at B-7 to B-10. Accordingly, the district court entered an order that granted Plaintiffs' motions to remand for lack of subject matter jurisdiction on the ground that complete diversity did not exist between the parties because Plaintiff Laura Howell Linton, in her representative capacity, is a stateless United States citizen. Appendix B at B-10. In its remand order, the district court recognized the separable nature of its previous FSIA Order, which had denied the Airbus Defendants' claim of immunity from suit under the FSIA, and the court expressly contemplated appellate review of that order:

> As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA").

Appendix B at B-11 n.12.

Before any notice of remand was sent to the clerk of the state court, the district court entered an order staying its remand order pending appeal to the Fifth Circuit on the FSIA

[2/]The district court later entered an order vacating the portion of its remand order that addressed personal jurisdiction. Appendix C at C-1 to C-2. As the district court recognized, "the relevant parties had stipulated to the Court's personal jurisdiction." *Id.*

issue. Appendix F at F-1. The order staying the remand order expressly stated that the district court's purpose in staying its remand order was to facilitate immediate appellate review of "the Airbus Defendants' Foreign Sovereign Immunities Act appeal." *Id.* On July 14, 1993, the Airbus Defendants timely filed their notice of appeal to the Fifth Circuit.

The Fifth Circuit dismissed Defendants' appeal and denied their alternative motion to recall the mandate from the prior appeal and their alternative petition for writ of mandamus. Appendix A at A-2 to A-3, A-19. In dismissing, the Fifth Circuit concluded that the district court's FSIA Order was not a separable order under Fifth Circuit precedent that narrowly construes the separable order doctrine, and thus, that the prohibition in 28 U.S.C. § 1447(d) deprived the Fifth Circuit of jurisdiction to review the case by appeal, mandamus, or otherwise. Appendix A at A-8 to A-12. The Fifth Circuit's opinion did, however, state that "the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity," and criticize the legal conclusions on which the district court based its FSIA Order. *Id.* at A-12 & n.28.

The Fifth Circuit has stayed the issuance of its mandate for the purpose of preparing this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE SEPARABLE ORDER DOCTRINE, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, DEPRIVES FOREIGN SOVEREIGNS OF THE RIGHT TO SEEK REVIEW UNDER THE COLLATERAL ORDER DOCTRINE OF AN ERRONEOUS DENIAL OF IMMUNITY FROM SUIT UNDER THE FSIA WHEN THE DISTRICT REMANDS THE CASE TO STATE COURT.

Section 1447(d) states that, except for civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d) (1988). In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court made clear that the seemingly unequivocal language of section 1447(d) may give way to permit appellate consideration of certain categories of remand orders. Although this case does not fall within the exception that this Court carved out in *Thermtron*, this case does fall within the "separable order" doctrine, which is based on this Court's earlier decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).

City of Waco involved a Texas state court action that was removed to the federal court on diversity grounds by a third-party defendant. When the district court dismissed the third-party action, diversity jurisdiction was destroyed, and the case was remanded to state court. Holding that the dismissal of the third-party action was not immune from review, this Court wrote:

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Id. at 143.

The circuit courts of appeals have construed the *City of Waco*'s separable order doctrine in a variety of cases and have developed conflicting case law under this doctrine. The Fifth Circuit's holding that the district court's FSIA Order was not "separable" from the remand order and therefore not reviewable deprives foreign sovereigns of the right to seek review under the collateral order doctrine of an erroneous denial of immunity from suit under the FSIA when the district court remands the case to state court. This decision conflicts with the decisions of other circuits and should be reversed by this Court.

A. The Separable Order Doctrine in the Fifth Circuit

The Fifth Circuit's holding in this case was based on prior decisions in the circuit construing this Court's decision in *City of Waco*. The Fifth Circuit has construed the separable order doctrine to require that the separable order both precede the order "of remand 'in logic and in fact' and is 'conclusive,' *i.e.*, it will have the preclusive effect of being functionally unreviewable in state court." Appendix A at A-10 to A-11. Finding that "the district court's determination that the FSIA is inapplicable to the Airbus Defendants can be deemed a jurisdictional finding" that could

be reviewed by the state court on remand, the Fifth Circuit relied on its previous decision in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993). In *Mobil*, the Fifth Circuit addressed whether a district court's ruling that the Insurance Co. of Ireland was not a foreign sovereign was reviewable on appeal when the case had been remanded to state court. In that case, the party claiming to be a foreign sovereign was not claiming immunity from suit under the FSIA, only the right to a federal forum and a bench trial.[3/] The Fifth Circuit held in *Mobil* that the district court's determination that the Insurance Co. of Ireland was not a foreign sovereign was a jurisdictional call, rather than a substantive ruling, and was thus not reviewable a separable order. *Id.* at 666.

Based on its decision in *Mobil*, the Fifth Circuit reasoned in this case that because the Airbus Defendants could assert their immunity from suit under the FSIA in state court and because the FSIA Order would have no preclusive effect on the state court on the immunity issue, the FSIA Order was not "conclusive." Appendix A at A-11. Failing to address that the remand order conclusively determined the Airbus Defendants' right to a federal forum under the FSIA as well as the issue of removability itself and the issue of *forum non conveniens*,[4/] the Fifth Circuit held that the FSIA

[3/]The Insurance Co. of Ireland could not have claimed immunity from suit because the commercial activity exception to the FSIA applied. 28 U.S.C. § 1605(a)(2) (1988 & Supp. V 1993).

[4/]The defense of *forum non conveniens* is not available to the Airbus Defendants in Texas state court. *See Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). Although the Texas Legislature legislatively overruled *Alfaro*, Act of February 23, 1993, S.B. 2, § 1, 73d Leg., 1st R.S. (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051), the new statute does not apply to this case because it was filed before September 1, 1993.

Order was not separable and that section 1447(d) barred appellate review of that order. *Id.* at A-11.

B. The Separable Order Doctrine in Other Circuits

1. The Third Circuit

In the Third Circuit, the FSIA Order would have been reviewable. *See In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992); *Carr v. American Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994). In *TMI*, the basis of removal jurisdiction was the Price-Anderson Amendment Act of 1988, 42 U.S.C. § 2011 (1988), which created a federal cause of action for nuclear accident claims and specified that federal courts have original jurisdiction and that claims under the Act filed in state court are subject to removal. *TMI*, 940 F.2d at 835. The district court held that the Act itself was unconstitutional because Congress in purporting to create a federal forum through the Act exceeded the authority granted to it by Article III, section 2 of the United States Constitution. *TMI*, 940 F.2d at 835. Because the district court held that the Act that was the basis of removal jurisdiction was unconstitutional, the district court remanded the case for lack of subject matter jurisdiction. *Id.*

The district court stayed the remand order and certified the issue of the constitutionality of the Act for an interlocutory appeal under 28 U.S.C. § 1292(b). *TMI*, 940 F.2d at 836. On appeal, the Third Circuit addressed whether section 1447(d) deprived it of jurisdiction to review "any aspect of the remand order, including the constitutional determination on which it was based." *TMI*, 940 F.2d at 836. The Third Circuit held that section 1447(d) did not bar review of the appeal of the district court's constitutionality

ruling despite the fact that the finding of unconstitutionality defeated the district court's subject matter jurisdiction, resulting in the case being remanded to state court. *TMI*, 940 F.2d at 836, 842.

The Third Circuit found that the *Thermtron* exception did not apply because "the district court relied *specifically* on section 1447(c) in reaching the determination to remand [and] the district court's conclusions of constitutional law ultimately implicated subject matter jurisdiction." *TMI*, 940 F.2d at 843. While the district court's decision in *TMI* that the Act was unconstitutional was a substantive decision preceding the remand order, the heart of the district court's ruling was jurisdictional. *Id.* Unless the Act had been found to be constitutional, there could be no federal subject matter jurisdiction. *Id.*

Nevertheless, the Third Circuit concluded that section 1447(d) was not intended to prevent review of an underlying substantive decision on the constitutionality of a federal statute. *TMI*, 940 F.2d at 836, 843. Nor did Congress "in enacting section 1447(d) . . . intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes." *TMI*, 940 F.2d at 843. The Third Circuit observed that if section 1447(d) bars review of a remand order based on a finding that the statute authorizing removal was unconstitutional, "[e]ach district court would thus be free to reach its own conclusion regarding the constitutionality of statutes authorizing removal" and "inconsistent results would be completely insulated from review." *TMI*, 940 F.2d at 846.

The Third Circuit also found that the order of remand was "conclusive." *Id.* at 845. The *TMI* decision makes clear that the issue that is conclusively determined by the order of remand is the issue of removability itself: "Remand

orders which are unreviewable under section 1447(d) remain unreviewable even on appeal from the final judgment of a state court." *TMI*, 940 F.2d at 845. As this Court has observed: "[T]he issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568-69 (1941). In conflict with *TMI*, the Fifth Circuit's decision in this case ignored the fact that the remand order conclusively determined the Airbus Defendants' right to a federal forum under 28 U.S.C. § 1441(d) and the removability issue itself.[5/] *See* Appendix A at A-11. Instead, the Fifth Circuit focuses its analysis of the conclusiveness of the remand order on whether the Airbus Defendants can reurge their immunity claim in state court on remand. *Id.* As *TMI* makes clear, this is not the proper inquiry.

The Third Circuit's *TMI* decision squarely conflicts with the Fifth Circuit's decision in this case. Had the district court in this case found that the FSIA was unconstitutional as exceeding Congress' Article III power and remanded the case to state court finding that the unconstitutionality of the FSIA deprived the court of removal jurisdiction under the FSIA, the Fifth Circuit's analysis, in conflict with the Third Circuit's decision in *TMI*, would bar review of the unconstitutionality holding under section 1447(d). Under the Fifth Circuit's decision in this case, a finding that the FSIA is unconstitutional would be a jurisdictional call that would have no preclusive effect on the state court on remand and thus not be "conclusive." *See* Appendix A at A-11.

[5/] As explained *supra* note 4 and accompanying text, the remand order also conclusively determined the *forum non conveniens* issue since that defense cannot be asserted in the state court to which the case was remanded.

Accordingly, under the Fifth Circuit's analysis, section 1447(d) would bar any review of the constitutionality ruling.

Although the underlying substantive determination in this case does not involve the constitutionality of a statute, the same compelling policy reasons apply to the underlying substantive determination of the applicability of the FSIA. A determination that the FSIA does not apply to a foreign sovereign claiming FSIA immunity is no less important than a determination that a statute is unconstitutional.[6/] As this Court has recognized, Congress' intent in enacting the FSIA and in providing foreign sovereigns an absolute right to remove actions against them to federal court was clear: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Indeed, given that a denial of a claim of immunity from suit is immediately appealable under the collateral order doctrine and that a determination of unconstitutionality is not immediately appealable, this case presents a more compelling reason to allow review as a separable order than did *TMI*.

The FSIA Order also would have been reviewable under the Third Circuit's recent decision in *Carr v. American Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994). In *Carr*, the Third Circuit held that an order is separable from a remand order if the issue that is dispositive of both the remand order and the order sought to be reviewed "has independent relevance in adjudging the rights of the parties (*i.e.*, relevance beyond determining the existence of federal subject

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[6/]For a full discussion of the importance of the FSIA, *see infra* subpart I(C).

matter jurisdiction)." *Id.* at 675.[7] In *Carr*, the plaintiff brought in state court a tort suit arising from a transfusion of Human Immunodeficiency Virus-infected blood against the American Red Cross and another party. *Id.* at 673. The Red Cross removed the case based this Court's decision in *American National Red Cross v. S.G.*, 112 S. Ct. 2465 (1992), which held that the Red Cross charter confers federal jurisdiction over civil cases to which Red Cross is a party. *Carr*, 17 F.3d at 674. Based on a release that the plaintiff gave Red Cross, the plaintiff moved to dismiss Red Cross and to remand the case to state court. *Id.* The district court dismissed Red Cross and, declining to exercise any residual supplemental jurisdiction over the remaining claim against the other defendant, remanded the case to state court. *Id.*

The Third Circuit, under this Court's *City of Waco* decision, held that the order dismissing Red Cross was separable from the remand order and that 28 U.S.C. § 1447(d) therefore did not bar review of the case. *Carr*, 17 F.3d at 675. The court found that the order of dismissal "had independent relevance in adjudging the rights of all three parties involved in this action." *Id.* Because "the ramifications of the dismissal order impacted on more than the issue of federal subject matter jurisdiction alone," the order of dismissal was a separable order under *City of Waco*. *Carr*, 17 F.3d at 675. Once the court found that 1447(d) presented no bar to appellate review, the court, determining that the order dismissing Red Cross was appealable as a final order under the *Cohen* collateral order doctrine,[8] found that it had jurisdiction to review the order dismissing Red Cross. *Carr*, 17 F.3d at 675-76.

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[7] *Accord Allen v. Ferguson*, 791 F.2d 611, 614 (7th Cir. 1986).

[8] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The result would have been different in this case under the rule followed in the Third Circuit in *Carr*. In this case, the FSIA Order had "relevance beyond determining the existence of federal subject matter jurisdiction,"—it determined the Airbus Defendants' claim of immunity from suit under the FSIA. *Id.* That the FSIA Order "impacted on more than the issue of federal subject matter jurisdiction alone," *id.*, would have made the FSIA Order reviewable in the Third Circuit. And, under the second prong of the *Carr* analysis, because the FSIA Order denied the Airbus Defendants' immunity from suit, the FSIA Order was—or ultimately under the doctrine of merger became—a final, appealable decision under the collateral order doctrine.[2/] *See, e.g., Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) (denial of immunity from suit under the FSIA is an appealable decision under the collateral order doctrine); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 494 U.S. 937 (1989); *Compania Mexicana de Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Gould, Inc. v. Pechiney Ugine*

[2/]The Fifth Circuit's opinion asserts with no support from the record that the district court never ruled on the Airbus Defendants' motion to dismiss based on the claim of immunity from suit "because it concluded that it lacked subject matter jurisdiction." Appendix A at A-15 n.34. The Fifth Circuit's attempt to distinguish between the district court's jurisdictional determination under the FSIA and its determination of the Airbus Defendants' claim of immunity from suit under the FSIA is misguided. The district court's FSIA Order, which held that the Airbus Defendants were not foreign sovereigns under the FSIA, necessarily determined that the Airbus Defendants were not entitled to dismissal based on their claim of immunity from suit. Even if the district court did not make a ruling on the Airbus Defendants' motion to dismiss, the district court's finding that the "FSIA does not apply to [the Airbus Defendants]," Appendix E at E-7 to E-8, was dispositive of the motion to dismiss based on immunity and is a de facto denial of a claim of immunity from suit, which is itself appealable.

Kuhlmann, 853 F.2d 445, 450 (6th Cir. 1988); *Eckert Int'l, Inc. v. Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 173 (E.D. Va. 1993), *aff'd*, 32 F.3d 77 (4th Cir. 1994).

2. The Ninth Circuit

Under Ninth Circuit precedent, 28 U.S.C. § 1447(d) would not bar appellate review of the FSIA Order. In the Ninth Circuit, when a district court's remand order is based on the resolution of the merits of some matter of substantive law of the parties apart from the jurisdictional decision, section 1447(d) does not foreclose appellate review of that decision. *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984).

In *Clorox*, the remand order was based on the district court's belief that Clorox had waived its right to remove. *Clorox*, 779 F.2d at 520. Concluding that a determination of waiver of the right to remove was a substantive decision on the merits apart from any jurisdictional decision, the Ninth Circuit found that section 1447(d) did not bar review of the decision. *Id.*

In *Pelleport*, the Ninth Circuit concluded that it could review the remand order in a contract case where the district court had remanded the case based on its conclusion that a forum selection clause in the contract was valid and enforceable. *Pelleport*, 741 F.2d at 276-77. The Ninth Circuit concluded that it could review the remand order because the remand order was not based on jurisdictional grounds but instead was based on a substantive determination affecting the rights of the parties. *Id.* at 277.

The result in this case also would have been different in the Ninth Circuit.[10/] In this case, the district court's remand order necessarily was based on the district court's decision that the Airbus Defendants were not agencies or instrumentalities of foreign sovereigns under the FSIA, which the district court had earlier resolved in its FSIA Order. Whether the FSIA applied to the Airbus Defendants was a matter of substantive FSIA law on the pooling of foreign interests and tiered ownership, which question determined the Airbus Defendants' claim of immunity from suit. This claim of immunity from suit was separable and "apart from any jurisdictional decision." *Pelleport*, 741 F.2d at 276.

3. The Sixth Circuit

Under Sixth Circuit precedent, section 1447(d) would not bar review of the FSIA Order. *See Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). In *Regis*, the plaintiff sought to remand the case based on a forum selection clause. *Id.* Following the Ninth Circuit's decision in *Pelleport*, the Sixth Circuit stated a more liberal test for the separable order doctrine than *Pelleport*:

[10/] The Ninth Circuit's approach, referred to by one court as the "matter of substantive law" exception, has been criticized by the Fifth and Eleventh Circuits, which construe exceptions to section 1447(d) more narrowly. *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1987).

Other circuits have followed the *Pelleport/Clorox* exception. *E.g.*, *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991); *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988).

> [A] remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction.

Id. This approach brings the Sixth Circuit in line with the Third Circuit's decision in *Carr*.

Under the Sixth Circuit's test, the remand order in this case was "based on a substantive decision on the merits of a collateral issue"—whether the Airbus Defendants were foreign sovereigns under the FSIA and thus entitled to immunity from suit—"as opposed to just matters of jurisdiction." *Regis*, 894 F.2d at 194.

C. The Fifth Circuit's Improper Application of Section 1447(d) to Bar Review of a Denial of a Claim of Immunity from Suit Under the FSIA Defeats the Policy of the FSIA.

As this Court has recognized, the FSIA was designed "'[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (quoting H.R. REP. No. 1487, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631). To implement fully this policy behind the FSIA, the statute must be uniformly applied "since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. REP. No. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611. Uniformity in the development of FSIA law is "best served by trying all FSIA cases in federal court unless the parties unequivocally choose otherwise." *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1212 (5th

Cir. 1991); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 894 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990).

In *Verlinden*, this Court recognized that in enacting the FSIA, Congress intended to circumvent the possibility of interference with foreign relations presented by the lack of uniformity and local bias in civil case law:

> Congress, pursuant to its unquestioned Art. I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states.

Verlinden, 461 U.S. at 497.

The two instances in which the bar to review in section 1447(d) and erroneous denials of FSIA status have clashed have already produced precisely the results that the Congress sought to avoid. It is now the law that the Insurance Company of Ireland ("ICI"), the party claiming to be an agency or instrumentality of a foreign state in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993), is *at the same time* a foreign state in the Third Circuit and entitled to a federal forum, but it is not a foreign state in the Southern District of Texas in the Fifth Circuit. *Compare In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n.8 (3d Cir. 1994) (ICI is an agency or instrumentality of a foreign state under the FSIA), *cert. denied*, 63 U.S.L.W. 3009 (U.S. Oct. 3, 1994) (No. 93-2070) *with Mobil Corp.*, 984 F.2d at 666 (holding that order remanding action based

on finding that ICI was not an agency or instrumentality of a foreign state under the FSIA is unreviewable).

As to Petitioner Airbus, the Fifth Circuit's refusal to review FSIA determinations in the present context has produced even more bizarre results. Within the Southern District of Texas, Airbus is an agency or instrumentality of a foreign state in Houston. *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994) (Black, C.J.) (denying a motion to remand, "the Court finds that [Airbus] is a sovereign entity"). Forty miles away, in Galveston, Airbus is not an agency or instrumentality of a foreign state. Appendix E at E-7 to E-8 ("FSIA does not apply to Airbus Industrie").

Congress explicitly mandated that foreign states receive federal forums for claims against them in order to promote uniform results and avoid the bias inherent in state courts. Interpreting section 1447(d) as prohibiting review of even erroneous determinations of FSIA status defeats the very goal Congress mandated.

The Fifth Circuit's decision also deprives foreign sovereigns of the right to seek review under the collateral order doctrine of an erroneous denial of immunity from suit under the FSIA. Such a deprivation can result any time that a plaintiff institutes an action in state court against a party that claims to be a foreign sovereign. The foreign sovereign has the right to remove the case to federal court under 28 U.S.C. § 1441(d). A foreign sovereign claiming immunity from suit under the FSIA will move to dismiss the suit, and the plaintiff will file a motion to remand. The resolution of both the motion to dismiss and the motion to remand will simultaneously be controlled by the same determination—the applicability of the FSIA. Under the Fifth Circuit's decision in this case and under Fifth Circuit precedent, a district

court's denial of a claim of immunity from suit will never be reviewable when there is remand order.

This disastrous result of the Fifth Circuit's decision can be averted only if this Court exercises its certiorari jurisdiction to resolve the conflict among the circuits on the proper application of the separable order doctrine and to decide the important question of whether a denial of immunity from suit under the FSIA is reviewable as a separable order even when the case has been remanded to state court.

D. The District Court's Underlying Denial of Immunity from Suit Under the FSIA Was Erroneous.

The ruling that the Airbus Defendants have vigorously sought to have reviewed is the district court's FSIA Order. In the FSIA Order, the district court held that the FSIA did not apply to the Airbus Defendants because the Airbus Defendants were not agencies or instrumentalities of foreign states for purposes of the FSIA. Appendix E at E-7 to E-8. Although the Fifth Circuit found that it had no jurisdiction to review the FSIA Order, the Fifth Circuit expressly stated its disagreement with the district court's FSIA Order. Appendix A at A-11 to A-12 n.26

The FSIA provides immunity to foreign states from the jurisdiction of Courts of the United States and of the States. 28 U.S.C. § 1604 (1988). Section 1603 of the FSIA defines a foreign state to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." *Id.* § 1603(a). Subsection (b) of section 1603 defines an agency or

instrumentality of a foreign state as an entity the majority of whose ownership interest is held by a foreign state. 28 U.S.C. § 1603(b).

At all relevant times herein, over fifty percent of the ownership interests of both Airbus Defendants was held by the governments of France, Germany, and Spain. These governments' interest in Airbus were held through four intermediary entities, although no one intermediary entity held a majority of Airbus by itself. The FSIA permits interests held by several foreign sovereigns to be pooled in determining whether the foreign states together own the requisite majority interest in the entity seeking FSIA protection.[11/] *See, e.g., Le Donne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1405-06 (E.D. Va. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see also* Appendix A at A-12 to A-13 n.28 (citing with approval cases permitting pooling).

The district court held that the interests in Airbus held by one of the intermediary entities, Deutsche Airbus GmbH, must be ignored in calculating the total ownership held by foreign states because Deutsche Airbus GmbH itself did not also qualify as a foreign state under the FSIA. Appendix E at E-4 to E-8. The Fifth Circuit, although it found that it had no jurisdiction to consider the issue, criticized the district court's holding:

[11/] In fact, Chief Judge Norman Black in *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994), expressly accepted the doctrine of pooling in his finding that the Airbus Defendants were foreign sovereigns under the FSIA.

> The controlling statute, however, erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity*—not its parent—have 'a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof.' There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Appendix A at A-12 to A-13 n.28.

Unless this Court exercises its certiorari jurisdiction and reverses the decision of the Fifth Circuit, the Airbus Defendants will have lost their right to seek review of the district court's erroneous denial of their immunity from suit under the FSIA.

CONCLUSION

The Fifth Circuit's decision in this case, unless reversed, will expand section 1447(d)'s prohibition against review of cases that have been remanded, defeat uniform development of the body of law under the FSIA, and disturb the relations of the United States and foreign sovereigns. The same exigencies of judicial administration that led this Court in the *City of Waco* to recognize the availability of review when there is a substantive decision that has relevance beyond determining the existence of subject matter jurisdiction justify this Court's exercise of its certiorari jurisdiction to reverse the decision of the Fifth Circuit in this case and to establish that an order denying FSIA immunity is separable from an order of remand based on a finding that

there is no federal subject matter jurisdiction under the FSIA, and therefore reviewable.

The Fifth Circuit's decision in this case should be reversed because it authorizes appellate courts to ignore erroneous district court decisions that deny foreign sovereigns' claims of immunity from suit under the FSIA when there is a remand order, gives district courts unfettered discretion in denying foreign sovereigns' legitimate claims of immunity from suit under the FSIA when the FSIA was also the basis of removal, will deprive foreign sovereigns of their right to a federal forum, and will defeat uniform application of the FSIA contrary to the express intention of Congress. Those serious consequences, it is submitted, are compelling reasons for this Court to exercise its certiorari jurisdiction.

Respectfully Submitted,

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Supreme Court, U.S.
FILED

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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AIRBUS INDUSTRIE, ET AL.,
Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-7479

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,

Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,

Defendants,

AIRBUS INDUSTRIE AND AEROFORMATION,

Defendants-Appellants.

Consolidated With

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,

Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,

Defendants,

AIRBUS INDUSTRIE AND AEROFORMATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(August 16, 1994)

WIENER, Circuit Judge.

Defendants-Appellants Airbus Industrie, G.I.E. ("Airbus") and its subsidiary, Aeroformation ("AeF"), (collectively "Airbus Defendants") were sued in state court. The Airbus Defendants removed this case to federal court, where they sought immunity from suit under the Foreign Sovereign Immunities Act ("FSIA").[1] Jurisdiction for this removal was based on two distinct grounds: diversity jurisdiction under 28 U.S.C. § 1332, and "federal question" jurisdiction under the FSIA and 28 U.S.C. §§ 1441 & 1330.

In an earlier order, the district court had concluded that the Airbus Defendants did not qualify as instrumentalities of foreign states. The Airbus Defendants immediately appealed that order, but in an unpublished opinion ("*Airbus I*")[2] we dismissed that appeal for lack of jurisdiction and remanded the case to the district court. On remand, the district court concluded that there was no diversity jurisdiction—hence no subject matter jurisdiction—and accordingly remanded the case to state court under 28 U.S.C. § 1447.

Once again the Airbus Defendants are before us seeking review, claiming, *inter alia*, that the FSIA order is an order that may be considered separate from the order to remand under the "separable order" doctrine; hence appellate review of the FSIA order is not precluded by § 1447. As explained below, however, the FSIA order is not "conclusive" and thus not a separable order under controlling jurisprudence. Moreover, as the FSIA order will have no

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[1] Codified at 28 U.S.C. §§ 1602-11.

[2] *Airbus Industrie v. Linton*, No. 92-7564 (5th Cir. Feb. 24. 1993).

preclusive effect on state courts, we can find no injustice here that would warrant recalling our mandate in *Airbus I* so as to consider the merits of that order.

The Airbus Defendants also claim that we may review the remand order because the remand was erroneously based on a "post-removal" event, i.e., a stipulation that effectively made one of the plaintiffs "stateless," thereby destroying diversity jurisdiction. We conclude, however, that § 1447 interdicts our jurisdiction to review remands for lack of subject matter jurisdiction, even if such remands are erroneously based on post-removal events. Accordingly, this appeal is dismissed.

I

FACTS AND PROCEEDINGS

Two sets of plaintiffs sued, among others, the Airbus Defendants in two separate suits in a Texas state court for damages caused by a plane crash in India. The Airbus Defendants removed these cases to federal court, where they were consolidated without objection into one case "for all purposes." The Airbus Defendants asserted two independent bases for jurisdiction: 1) diversity jurisdiction under 28 U.S.C. § 1332, and 2) "federal question" jurisdiction under the FSIA and 28 U.S.C. §§ 1441(d) & 1330(a). Once in federal court, the Airbus Defendants filed a motion for dismissal, claiming that: 1) they were immune from suit under the FSIA; and 2) they were not subject to in personam jurisdiction. In addition, the Airbus Defendants requested dismissal on forum non conveniens grounds. In response, the plaintiffs filed a motion to remand.

In a published order, the district court ruled that neither Airbus nor its subsidiary, AeF, were instrumentalities

of foreign states.[3] The essence of that ruling by the district court is that, even assuming that the interests of several foreign countries may be combined, ("pooling"), the interest of one of the foreign countries here at issue—Germany—could not be included in this particular pool. According to the district court, Germany's interests could not be pooled with the interests of other countries because Germany did not own a majority interest in the companies through which Germany held its ownership interest in the Airbus Defendants ("tiering").[4] Absent inclusion of Germany's interest, neither Airbus Defendant had a majority of its shares owned by a foreign state (or states) as required by 28 U.S.C. § 1603(b)(2).

The Airbus Defendants immediately appealed this order of the district court. In that appeal—*Airbus I*—we dismissed for lack of appellate jurisdiction.[5] We concluded that, although denials of motions to dismiss for lack of FSIA immunity generally are appealable despite their interlocutory nature, the district court had failed to rule on the entirety of the motion before it, specifically, on the issues of jurisdiction in personam and forum non conveniens. In remanding, we required the district court to "rule on plaintiffs' motions to remand and defendants' motions to dismiss expeditiously."[6]

Sometime after we remanded to the district court but before it ruled on the remanded issues, the Airbus Defendants entered into joint stipulations with plaintiffs regarding the residency and travel patterns of certain of those

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[3] *Linton v. Airbus Industrie*, 794 F.Supp. 650 (S.D.Tex. 1992).

[4] *Id.* at 652-53

[5] *Airbus Industrie* v. *Linton*, No. 92-7564 (5th Cir. Feb. 24, 1993).

[6] *Id.*

plaintiffs. Presumably the Airbus Defendants agreed to enter into these stipulations in an effort to bolster their forum non conveniens argument. Unfortunately for those defendants, though, these stipulations were to have an undesired effect.

When the district court did issue its final order on remand from *Airbus I*, it addressed—but did not rule upon—the issues remaining in the Airbus Defendants' motion to dismiss, ruling only on the plaintiffs' motion to remand. After noting that it would have dismissed on either in personam jurisdiction or forum non conveniens grounds, the district court observed that there was "a fly in this ointment." That fly had been spawned by the joint stipulations that had the effect of recognizing one of the plaintiffs to be a "stateless" person for jurisdictional purposes, thereby destroying diversity jurisdiction. As that court's earlier order had rejected the FSIA as a basis for "federal question" jurisdiction, the district court concluded that it lacked subject matter jurisdiction altogether, and remanded accordingly, stating: "It is further ORDERED that Plaintiffs' Motion to Remand is GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION...." Presumably due to its lack of jurisdiction, the district court declined to issue any order or ruling on the Airbus Defendants' motion to dismiss.

Encouraged to do so by the district court,[7] the Airbus Defendants timely appealed; and the district court stayed its remand order pending resolution of this appeal.

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[7] Despite its remand for lack of subject matter jurisdiction, the district court believed that the FSIA Order was separable and appealable, stating:

> As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA").

II
DISCUSSION

A. *Jurisdictional Bar of § 1447(d) and the FSIA*

Subsection (c) of § 1447 provides in pertinent part that: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded."[8] Subsection (d) of that same section provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[9] The Supreme Court has made abundantly clear that subsection (d) operates as an absolute bar to appellate review, stating that § 1447(d) speaks in terms of an "unmistakable command" so as to preclude review of remands for grounds stated in § 1447(c) "by appeal, mandamus, or otherwise."[10]

Albeit under distinguishable circumstances, we addressed the relationship between the FSIA and the jurisdictional bar of § 1447(d) in *Mobil Corp. v. Abeille General Insurance Co.*[11] Mobil had sued several insurance companies in a declaratory judgment action in state court. One of those insurance companies, the Insurance Company of Ireland ("ICI"), claimed that it was an instrumentality of a foreign state under the FSIA and removed to federal court.

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[8] 28 U.S.C. § 1447(c) (emphasis added).

[9] 28 U.S.C. § 1447(d).

[10] *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977) (per curiam); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1976).

[11] 984 F.2d 664 (5th Cir. 1993).

Presumably because it was engaged in a commercial activity in the United States, ICI made no claim to immunity[12]; ICI nonetheless contended that its status as an instrumentality of a foreign state entitled it to a bench trial in a federal forum under the FSIA and 28 U.S.C. § 1441(d). The district court disagreed, concluding that ICI was not an instrumentality of a foreign state, and consequently remanded to the state court—at least in part—for lack of subject matter jurisdiction.[13]

On appeal, ICI argued that the FSIA fell within an exception to § 1447(d). Specifically, it claimed that the decision on FSIA immunity is typically a substantive one that would terminate the litigation before remand if immunity were granted. ICI also observed that denials of sovereign immunity are subject to interlocutory appeal. ICI thus reasoned that unique FSIA concerns justified reviewing the district court's "substantive" decision denying foreign-state status.[14]

In *Mobil* we flatly rejected ICI's argument. We first stated that Congress enacted § 1447(d) so that state court actions could proceed without delay if the district court remanded for lack of jurisdiction—regardless of the correctness of the district court's jurisdictional decision.[15] We then rejected any attempt to cloak an FSIA jurisdictional call with a substantive mantel, stating that "[a]lthough the existence of removal jurisdiction may depend on substantive

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[12] *See* 28 U.S.C. § 1605(a)(2) (providing that immunity does not apply to certain types of commercial activity).

[13] *Id.* at 665-66.

[14] *Id.* at 666.

[15] *Id.*

matters, the absence of removal jurisdiction is a procedural defect governed by § 1447(c)."[16] We concluded with the recognition that even though an unreviewed remand may—as a practical matter—work a deprivation of immunity, such a risk was implicit in Congress's decision not to create in the FSIA an express exception to non-reviewability.[17]

B. *Attempts to Avoid the § 1447 Jurisdictional Bar*

Against the harsh backdrop of *Mobil* and § 1447 the Airbus Defendants raise a plethora of imaginative theories to encourage our finding of jurisdiction to hear this appeal. Unfortunately for the Airbus Defendants, however, none of these theories "hang together."

1. Separability Doctrine

The Airbus Defendants contend that the district court's ruling on their status under the FSIA is a "separable order" reviewable apart from the decision to remand. They urge that *Mobil* does not control here because—unlike the defendant in *Mobil*—the Airbus Defendants do not seek review of the district court's order of remand; rather, they seek review of the FSIA order itself. Additionally, note the Airbus Defendants, the defendant in *Mobil* did not claim immunity and likely could not have, given the commercial activity exception,[18] whereas the Airbus Defendants vigorously assert their entitlement to immunity—which

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[16] *Id.* (quoting *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924, 926 (5th Cir. 1992)).

[17] *Id.* The court in *Mobil* also noted that this circuit had refused to create implicit exceptions to § 1447(d) in other contexts. *Id.*

[18] *See* 28 U.S.C. § 1605(a)(2).

typically gives rise to an order that is immediately appealable under the *Cohen* collateral order doctrine. Although the Airbus Defendants make an appealing argument, we must conclude that the FSIA order is not "separable" and hence not reviewable on appeal.

The notion that certain orders may be reviewed on appeal if such orders are "separable" from the order of remand originated with the Supreme Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934). In *City of Waco*, Curtis Boggs filed suit in Texas state court against the city of Waco, Texas, and its contractor, Combs & Glade, for damages Boggs allegedly caused by a street obstruction.[19] The city then brought United States Fidelity Company & Guaranty Company ("Fidelity"), surety on a bond of Combs & Glade, into the suit by way of a "cross-action," alleging that Fidelity "was liable under the bond to pay whatever amount might be adjudged due by the City by reason of the fault [Combs & Glade]."[20] Fidelity removed the case to federal court, and Boggs moved for a variety of relief, including that the entire case be remanded or that the case against Fidelity be dismissed and the remainder of the case remanded.[21]

In a single order, the district court denied Boggs' motion to remand the entire case but granted the motion to dismiss the cross-action, finding that as to Boggs' cause of action "the Fidelity Company was an unnecessary and

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[19] *City of Waco*, 293 U.S. at 141, 55 S.Ct. at 6.

[20] *Id.*

[21] *Id.* at 141-42, 55 S.Ct. at 6-7.

improper party."[22] Because this dismissal eliminated diversity jurisdiction, the court remanded the remainder of the case for lack of subject matter jurisdiction. [23]

The Supreme Court eventually determined that the remand order did not preclude appellate review of the dismissal order, stating:

> True, no appeal lies from the order of remand; in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the [city of Waco].

The Court also explained that although "a reversal cannot affect the order of remand, ... it will at least, if the dismissal of the [city's] complaint was erroneous, remit the entire controversy, with the Fidelity Company as a party, to the state court for such further proceedings as may be in accordance with law." [24]

In determining whether an order is "separable" and thus can be afforded appellate review under *City of Waco*, we have focused on language in the Court's opinion suggesting that an order is "separable" from an order of remand if it precedes that of remand "in logic and in fact" and is "conclusive," i.e., it will have the preclusive effect of

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[22] *Id.* at 142, 55 S.Ct. at 6-7.

[23] *Id.*

[24] *Id.* at 143-44, 55 S.Ct. at 7.

being functionally unreviewable in the state court.[25] Although the district court's FSIA order in the instant case may have preceded the court's order of remand "in logic and in fact," we cannot say that it was "conclusive." In light of the district court's ultimate conclusion that the entire case had to be remanded for lack of subject matter jurisdiction, the district court's determination that the FSIA is inapplicable to the Airbus Defendants can be deemed a jurisdictional finding under the facts of this case and, as such, can be reviewed by the state court upon remand.[26] Under *City of Waco* and the jurisprudence of this circuit, the district court's

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[25] *See, e.g., John G. & Marie Stella Kenedy Memorial Found. v. Mauro*, 21 F.3d 667, 670 (5th Cir. 1994) (determining that the district court's dismissal of § 1983 claims barred by the Eleventh Amendment before its remand of pendent state law claims was reviewable on appeal); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (concluding that the portion of a remand order that resubstituted an individual for the United States as defendant and thus destroyed removal jurisdiction was reviewable on appeal because it was separable from the remand order and final for purposes of appeal); *Adams v. Sidney Schafer & Assocs.,Inc. (In re Adams)*, 809 F.2d 1187, 1189 (5th Cir. 1987) (explicitly observing that unless the district court's "reinstatement" order were reviewed on appeal, it would be "functionally unreviewable" by the state court); *cf. Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 419 (5th Cir. 1991) (explaining that district court's determination that the plaintiff's claims were not within the boundaries of ERISA pre-emption was a "jurisdictional finding" under the facts of the case that could be reviewed by the state court on remand and thus was not "separable").

[26] *Soley*, 923 F.2d at 409-410 (indicating that findings made for the purpose of determining federal jurisdiction have no preclusive effect on the state court); *see Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347-50 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *see also Mobil*, 984 F.2d at 666 (rejecting an attempt to cloak an FSIA jurisdictional call with a substantive mantle).

FSIA order is therefore not "conclusive" upon the Airbus Defendants so as to be "separable" and hence reviewable by this court.

2. Non-Preclusive Nature of FSIA Order

In apparent recognition of our inability to review the FSIA order *simpliciter*, the Airbus Defendants proffer two arguments. First, they suggest that if no other alternative method exists for acquiring jurisdiction, we should exercise our inherent powers to recall our earlier mandate "to prevent injustice." In support of this contention, the Airbus Defendants point out that they have assiduously pursued their claim of immunity, both at trial and on appeal. Yet their appeal in *Airbus I* was dismissed as premature and their second appeal is being treated at "too late." [27] The Airbus Defendants conclude that such a result effectively deprives them of immunity, thereby working an injustice that—given the absence of other options—can only be prevented here by a recall of the mandate. The poignancy of this claim is enhanced by the fact that the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity.[28]

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[27] We observe the Airbus Defendant recognized this problem early-on in their Petition for Panel Rehearing presented to the *Airbus I* panel. Unfortunately, such foresight is of little help here.

[28] As noted in Part I, the resolution of the Airbus Defendants' claim of immunity turns on whether through "tiering" a foreign state's ownership interest can be attributed when that foreign state did not own a majority interest in the company that held the ownership interest in Airbus. The district court answered this question in the negative. *See Linton*, 794 F.Supp. at 653-54. Hence, Germany's interests could not be pooled since Germany failed to own a majority interest in the companies through which Germany held its ownership interest in the Airbus Defendants. The controlling statute, however, erects no explicit bar to

Although the Airbus Defendants are correct in asserting that we have authority to recall our mandate "to present injustice,"[29] we discern no such injustice here. Significantly, the district court's conclusions regarding the FSIA status of the Airbus Defendants were "jurisdictional" under the facts of this case; they thereby have no preclusive effect on the state courts.[30] Thus, the only consequence of

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the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity*—not its parent—have "a majority of [its] shares or other ownership interest ... owned by a foreign state or a political subdivision thereof." 28 U.S.C. § 1603(b)(2). There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

We also observe that the district court questioned whether the interests of two or more foreign states could be combined, commenting that "pooling" appears to be foreclosed by the use of the state ("singular") in the FSIA. *Linton*, 794 F.Supp at 652. This reasoning probably should be examined in light of the rules of statutory construction, e.g., 1 U.S.C. § 1 (providing that "words importing the singular include and apply to several persons, parties, or things" unless the context indicates otherwise), and in light of the cases in which the pooling issue has been considered. *See e.g., LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400, 1405-06 (E.D.Va. 1988) (concluding that pooling was allowed); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F.Supp. 553, 568-69 (C.D.Cal. 1979) (assuming same), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982); *Rios v. Marshall*, 530 F.Supp. 351, 371 (S.D.N.Y. 1981) (assuming same).

[29] *See* 5th Cir.R. 41.2; *see also, e.g., Masinter v. Tenneco Oil Co.*, 934 F.2d 67, 68 (5th Cir. 1991) (stating that a mandate may be recalled only to prevent injustice); *Canal Ins. Co. v. First Gen. Ins. Co.*, 901 F.2d 45, 46-47 (5th Cir. 1990) (recalling mandate to modify it so that the district court could consider awarding interest).

[30] *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 409 (5th Cir. 1991) (concluding that orders construed as "jurisdictional" and that lead to remand under § 1447 do not have preclusive effects on state

not recalling the mandate here is that the Airbus Defendants must have the merits of their FSIA claims determined by a state court rather than by a federal court. As such, there is no "injustice," for our counterparts in the state system are competent to address the Airbus Defendants' claims of immunity under the FSIA.[31] Accordingly, we decline their invitation to recall the mandate of *Airbus I*.

The Airbus Defendants argue in the alternative that the district court's failure to rule is itself an appealable denial of immunity. In support of this claim the Airbus Defendants cite *Helton v. Clements*,[32] in which we held that a failure to rule on a motion for immunity may itself constitute an appealable decision. They point out correctly that *Helton* is premised on the notion that a refusal to rule on a motion for immunity effectively denies that immunity by subjecting the defendants to the burdens of trial—the same expense and exposure that foreign sovereign immunity is designed to prevent.[33] The Airbus Defendants complain that they are indeed suffering here from the very harm that *Helton* envisioned and sought to prevent. They insist that, by "refusing" to rule on their motion to dismiss, the district court has subjected them to a remand and the likelihood of trial in state court.

Although we sympathize with the Airbus Defendants' plight, we do not read *Helton* as applicable to the instant

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courts); *Mobil*, 984 F.2d at 666 (observing that state courts would be able to reconsider the FSIA issues after remand).

[31] *See* 28 U.S.C. §§ 1602, 1603-11 (providing statutory grant of concurrent jurisdiction to state courts to resolve FSIA suits).

[32] 787 F.2d 1016, 1017 (5th Cir. 1986).

[33] *Id.* at 1017.

facts. In *Helton*, the refusal to rule subjected the defendants to the burdens of trial, thereby effectively negating the defendant's immunity. As noted here, however, the refusal to rule—even if it can be properly characterized as such[34]—merely means that the Airbus Defendants' claims to immunity will be considered by the state courts instead of by a federal appellate court. Thus, unlike the defendants in *Helton*, the Airbus Defendants have not been effectively denied their claimed immunity; they simply must have that issue resolved in a different forum—one which undoubtedly consider federal jurisprudence to be instructive, albeit non-binding.

3. Mandamus and § 1447

The Airbus Defendants also contend that 1) the district court remand was based on a "post-removal event"—the citizenship stipulation—2) such remand meant that the case was originally "properly removable," and 3) the remand for this post-removal event was thus not based on a ground enumerated in § 1447(c). Therefore, conclude the

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[34] The district court refused to rule on the motion to dismiss on remand because it concluded that it lacked subject matter jurisdiction. Refusing to rule under these circumstances was proper. *See, e.g., In re Carter*, 618 F.2d 1093, 1098 (5th Cir. 1980). Thus, the only valid complaint left is that the district court refused to rule before the first appeal. But unlike the court in *Helton*—which explicitly refused to rule on the immunity issue—the district court in the instant case did in fact make such a ruling; it merely did so in a form that was presumed to be unappealable owing to that court's failure to rule on the other grounds raised in the motion to dismiss. Because we conclude that the Airbus Defendants's are not precluded from reurging their immunity defense in state court, we need not, and therefore do not, decide whether a ruling on immunity in a form that is deemed unappealable is itself a "refusal to rule" subject to appeal.

Airbus Defendants, this remand is reviewable by mandamus.[35]

We find this argument intriguing yet unpersuasive. Initially, we note that mandamus adds nothing to the authority of this court to review jurisdictional remands under § 1447. When such a remand order is not reviewable by appeal it is not reviewable "otherwise."[36]

Turning to the merits of the Airbus Defendants' contention, we observe that—even if this stipulation can properly be considered a "post-removal" event[37]—we have

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[35] The Airbus Defendants also argue that this stipulation applied to only one of the two cases that had been consolidated here. Hence, the order remanding both cases for lack of subject matter jurisdiction was in error. Such an argument misapprehends the nature of the bar in § 1447: If a district court remands for lack of subject matter jurisdiction, then that remand order may not be reviewed even if it were clearly erroneous. *E.g.*, *Tillman v. CSX Transportation*, 929 F.2d 1023, 1028 (5th Cir. 1991).

[36] *See* 28 U.S.C. § 1447(d); *Gravitt*, 430 U.S. at 723, 97 S.Ct. at 1439 (holding that we cannot use mandamus to review a remand order that would not be reviewable by direct appeal).

[37] The plaintiffs argue that no post-removal event is involved here, as the stipulation merely related to the plaintiffs status at the time of removal. *CF. Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 565 (5th Cir. 1993) (concluding that affidavit which merely clarified the amount in controversy at time of removal was not a post-removal event). The Airbus Defendants claim that the stipulation itself is the post-removal event; according to them the stipulation did not relate back to the plaintiffs status at the time of removal because the district court had previously held that the plaintiffs' petition estopped them from contesting that status. *Cf. St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290, 58 S.Ct. 586, 590-91, 82 L.Ed. 845 (1938) (events occurring subsequent to removal generally do not oust a district court of jurisdiction). As we conclude that this stipulation is not reviewable even

twice before concluded that jurisdictional remands premised on post-removal events are not reviewable. In *Tillman v. CSX Transportation*,[38] the district court remanded for lack of subject matter jurisdiction based on a post-removal event—the joinder of a state agency. Despite the fact that this decision was clearly wrong—and that it was based on a post-removal event—we held that it was nonetheless non-reviewable because the remand was granted on § 1447(c) jurisdictional grounds.[39] *Tillman* merely followed our prior precedent, *In re Merrimack Mutual Fire Insurance Co.*,[40] in which we stated that such remands are not reviewable in light of Supreme Court precedent and the statutory policy of avoiding substantial delays caused by appellate review.

Finally, we conclude that the attempt by the Airbus Defendants to distinguish cases such at *Tillman* simply does not work.[41] The Airbus Defendants argue that *Tillman* involved the joinder of a party, one of the grounds expressly enumerated in § 1447(e). Accordingly, insist the Airbus Defendants, as this is a ground enumerated in subsection (e)

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if it were classified as a post-removal event, we need not decide which of the foregoing characterizations is more apt.

[38] 929 F.2d 1023, 1025 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 176, 116 L.Ed.2d 139 (1991).

[39] *Id.* at 1028-29.

[40] 587 F.2d 642, 647-49 (5th Cir. 1978).

[41] The Airbus Defendants also cite recent precedent in the Sixth Circuit and the Seventh Circuit that authorizes review of remands based on post-removal events. *See Baldridge v. Kentucky-Ohio Transp.*, 983 F.2d 1341, 1348-49 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1132 (7th Cir. 1992). Airbus and AeF do not argue, however, that these cases recognize any grounds—such as a favorable statutory change—that would negate the precedential force of *Tillman* and *Merrimack*.

of § 1447, it falls within the bar contained in subsection (d) of that same section. The instant case is thus different, they urge, because it involves a remand based on a non-enumerated ground—the loss of diversity jurisdiction caused by a change in citizenship status.

But our cases, such as *Tillman*, are not based on any purported "enumerated-non-enumerated" distinction between the various grounds for the lack of jurisdiction. Rather, these cases are premised on the concept that when the district court declares that it is remanding for lack of subject matter jurisdiction, its remand order may not be reviewed on appeal, no matter how erroneous. The "operative fact" is the ultimate one—the districts court's conclusion that it no longer has jurisdiction. Efforts to dissect the reasoning of that conclusion so as to find appellate jurisdiction are little more than veiled attempts to investigate indirectly the correctness of the district court's conclusion. Our concluding statement in *Tillman* regarding the non-reviewability of such error is instructive:

> Consequently, having been erroneously remanded on § 1447(c) jurisdictional grounds, this case is irretrievably beyond anything we can do about it. We cannot review it by any means. We emphasize our complete inability to do anything about the trial court's joinder order, whether interlocutory or final, because what we cannot review we cannot by some juridical self-help get back to federal court.[42]

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[42] *Tillman*, 929 F.2d at 1029.

III

CONCLUSION

> I call them the Wards in Jarndyce. They are caged up with all the others. With Hope, Joy, Youth, Peace, Rest, Life, Dust, Ashes, Waste, Want, Ruin, Despair, Madness, Death, Cunning, Folly, Words, Wigs, Rags, Sheepskin, Plunder, Precedent, Jargon, Gammon, and Spinach![43]

Like the poor Wards in Jarndyce, the Airbus Defendants have searched in vain for resolution of their claim. We take comfort, though, in the fact that, unlike the Wards in Jarndyce—who were forever consigned to wander about in the fog of Chancery court—the Airbus Defendants will be able to have the merits of their claim of FSIA immunity heard, albeit in state court. We are confident that there the FSIA immunity claim and its central issues of pooling and tiering will receive the full, objective and learned consideration to which they are clearly entitled.

As we conclude that, under the peculiar circumstances of this matter, the district court's remand for lack of subject matter jurisdiction deprives us of jurisdiction to review the instant case, the motions of the Airbus Defendants that we recall the mandate in Number 92-7564 and that we issue a writ of mandamus are denied; and the motion of appellees that this appeal be dismissed is granted.

DISMISSED.

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[43] CHARLES DICKENS, BLEAK HOUSE, ch. 60 (1853).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET AL., Defendants;	§	CONSOLIDATED WITH
MR. & MRS. STAN MOSS, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-103
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

Before the Court is the Motion to Dismiss of Defendants Airbus Industrie and Aeroformation. [1] In their first responsive pleading filed in this Court, Defendants moved to dismiss all claims against them for, inter alia, lack of personal jurisdiction and forum non conveniens. The Court considers each of these contentions in turn.

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[1] Hereinafter referred to collectively as "Defendants."

I. PERSONAL JURISDICTION

A federal court may not consider a forum non conveniens motion if it lacks jurisdiction over the parties. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947); Allstate Life Ins. Co. v. Linter Group Ltd., 782 F.Supp. 215, 219 (S.D. N.Y. 1992). If personal jurisdiction is challenged, the burden is on the plaintiff to prove the existence of jurisdiction by a preponderance of the evidence. Linter, 782 F. Supp. at 219-220. Initially, however, the plaintiff is only required to make a prima facie showing that jurisdiction exists. See, e.g., id., Villar v. Crowley Maritime Corp., 780 F.Supp. 1467, 1481 (S.D. Tex. 1992), aff'd, Nos. 92-7162, 93-7036, slip op. 4369, 4379 (5th Cir. May 25, 1993). In the instant case, Plaintiffs have failed to respond to Defendants' motion. As the other evidence in the record fails to establish prima facie evidence of this Court's ability to exercise personal jurisdiction over Defendants, the Court must conclude that it lacks personal jurisdiction over them.

II. FORUM NON CONVENIENS.

If this Court could exercise jurisdiction over Defendants, the Court would dismiss this action for forum non conveniens.

A. Choice of Law

Plaintiffs recognize that "the Fifth Circuit has previously held that the Federal law of forum non conveniens applies in a diversity case," but then go on to argue that this

Court should apply Texas forum non conveniens law, [2] rather than federal law, in this case. However, in In re Air Crash Disaster,[3] the Fifth Circuit, in a carefully considered opinion, expressly held that federal courts must apply federal forum non conveniens law. Id. at 1156-59. The Fifth Circuit has repeatedly affirmed this conclusion. See, e.g., Villar v. Crowley Maritime Corp., Nos. 92-7162, 93-7036, slip op. 4369, 4379 (5th Cir. May 25, 1993); Nolan v. Boeing Co., 919 F.2d 1058, 1068 n.11 (5th Cir. 1990), cert. denied, 111 S.Ct. 1587 (1991). Thus, Plaintiffs' argument to the contrary is patently frivolous and exceeds the bounds of zealous advocacy. Villar, slip op. at 4381. The only forum non conveniens issue before the Court is whether dismissal is appropriate under federal law.

2. Application of Federal Forum Non Conveniens Law.

Before dismissing a case for forum non conveniens, a court must first determine whether an adequate foreign forum exists. In re Air Crash Disaster, supra, 821 F.2d at 1165. A forum is adequate if all the parties are subject to jurisdiction there, the entire case can be heard there, and all the parties will be treated fairly. Id.

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[2] In Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 677-79 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991), the Texas Supreme Court held that, under Texas law, a district court may not dismiss a wrongful death or personal injury action for forum non conveniens. Recently, this decision was legislatively overruled. See 61 U.S.L.W. 2580 (March 30, 1993).

[3] 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989).

Several federal courts have found that both India and France are adequate forums for resolving claims similar to those asserted in the instant case. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (France); Chhawchharia v. Boeing Co., 657 F. Supp. 1157, 1159-60 (S.D. N.Y. 1987) (India); In re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp. 842, 845-52 (S.D. N.Y. 1986) (India), aff'd as modified, 809 F.2d 195 (2d Cir.), cert. denied sub nom. Executive Comm. Members v. Union of India, 484 U.S. 871 (1987). The Court has considered these decisions and other similar ones and is in agreement with their conclusions.

Additionally, in the instant case, Defendants have agreed to submit to the jurisdiction of the Courts of either India or France, to waive all limitations defenses, and to condition dismissal from this Court to allow for reinstate if the foreign courts decline to exercise jurisdiction. Under these circumstances, both India and France are adequate foreign forums.

Plaintiffs' only argument to the contrary is that, because neither India or France permits contingent fee arrangements, a forum non conveniens dismissal will effectively end this litigation. While this may be true, it is not a persuasive argument. To say that Plaintiffs will not, for economic reasons, pursue their claims in French or Indian courts is not to say that those courts would not afford them a remedy. Plaintiffs' preference for an American forum does not render either France or India inadequate.

Once it is determined that an adequate foreign forum exists, a court must balance the public and private interest factors outlined by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). The private interest factors include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508.

The relevant public factors include

> the administrative difficulties caused by crowded dockets, the burden of imposing jury duty on citizens of a forum with no relation to the dispute, the local interest in having localized controversies decided in that locality, and the appropriateness of deciding diversity cases in the forum whose law provides the substantive rules of decision.

Villar v. Crowley Maritime Corp., supra, 780 F. Supp. at 1484-85 (citing id. at 508-09).

In the instant case, after carefully examining the record, the Court is convinced that, assuming it has jurisdiction and that venue was properly laid, a forum non conveniens dismissal is appropriate. As to the private factors, many of the Plaintiffs are not United States citizens[4] and none of the few that are are residents of Texas. Moreover, this accident occurred in India. Should a view of the crash site be necessary, India would be a much more convenient forum and France would be at least as

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[4] However, several are citizens of India.

convenient. Also, many of the witnesses with knowledge of Defendants' manufacturing and design procedures are located in France. Similarly, many of the witnesses with knowledge of the crash and of related activities subsequently undertaken are in India. Likewise, there is no evidence that the cost of obtaining witnesses will be any greater in France or India than it would be in Texas.[5] Thus, on balance, the Court believes that the private interest factors favor dismissal.

Similarly, the public interest factors also favor dismissal. This action is probably governed by foreign law.[6] The courts of India and France are in a better position to apply their own law and in at least as good a position to apply each other's law as is this Court. Moreover both France, because of its relationship with Defendants, and India, because of the situs of the crash, have an interest in deciding this case. Texas has none, beyond a general commitment, now legislatively abolished and never, in any case, recognized by the federal courts, to serving as the world's courthouse. Thus, retention of this case in this Court would be an extreme imposition to Texas jurors, Texas court personnel, and other litigants with cases pending before this Court.

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[5] Presumably it would be less since this case has no relationship whatsoever to Texas and very little to the United States.

[6] Under Texas choice-of-law rules, the law of the forum with the most significant relationship to the controversy applies. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984). Texas has no significant relationship to this controversy, and there is no evidence that any state has a more significant relationship than either India or France. Thus, if this case were heard in this Court, Indian or French law would most likely control.

3. Dismissal vs. Remand.

Finally, Plaintiffs argue that the Court should remand this action to state court rather than dismiss it for forum non conveniens. Even assuming that the Court has the discretion to remand this case rather than to dismiss it for forum non conveniens, it is not required to do so. See Nolan v. Boeing Co., supra, 919 F.2d at 1069-70. This case has no connection with Texas, thus a Texas state court would be no more convenient than this Court. Likewise, Plaintiffs have an adequate, alternative forum, thus remand would serve no purpose other than to allow Plaintiffs to maintain a contingent fee arrangement with their attorneys. Thus, in the normal course of events, the Court would dismiss this case for lack of personal jurisdiction and, in the alternative for forum non conveniens; it would not remand it back to state court.

III. SUBJECT MATTER JURISDICTION.

There is, however, a fly in this ointment. In their Motion to Remand, Plaintiffs asserted that complete diversity was lacking because Andrew and Sarah Howell (the "Howells"), the parents of Plaintiff Laura Howell Linton, were stateless citizens of the United States. As the Personal Representative of the Howells' estates, Plaintiff Linton, in her representative capacity, was also stateless for jurisdictional purposes.[7] Because the presence of a stateless citizen of the United States on either or both sides of a controversy destroys diversity, remand was proper.

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[7] 28 U.S.C. § 1332(c)(2) provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ."

After noting that the initial removal was proper because, according to both the original state-court petition and the state-court pleadings on file at the time of removal, Plaintiff Linton was a resident of Maryland in both her individual and representative capacities,[8] the Court held that Plaintiffs were estopped from controverting these jurisdictional facts because the facts relating to the Howells' domicile were, or should have been, within the knowledge of Plaintiffs at the time suit was filed. Thus, in the Court's view, Plaintiffs' allegation that the Howells' only domicile was in Korea was suspect, especially given that Plaintiffs offered no reason for their failure to so allege prior to removal.

Subsequently, however, the Linton Plaintiffs entered into several stipulations with Defendants. In particular, these parties stipulated that

1. the Howells lived and worked in Korea from 1985 until their deaths;

2. the Howells maintained their sole place of residence in Korea; and

3. the Howells did not have a permanent residence in the United States.[9]

In other words, it now appears that Defendants have admitted what the Court previously held Plaintiffs were estopped from

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[8] See, e.g., 14A Charles A. Wright et al., Federal Practice & Procedure § 3723, at 312 (2d ed. 1985) (removal based on diversity proper if complete diversity exists at the time of filing and at the time of removal) [hereinafter Wright & Miller].

[9] See Exhibit B, Def.s' Supp. Mot. Dismiss.

asserting, viz. that the Howells were stateless citizens of the United States.[10] If the parties are willing to stipulate to these facts, the Court does not feel compelled to ignore them in considering the question of its subject matter jurisdiction.

As noted above, this case was properly removed given the allegations in the initial pleadings and those on file at the time of removal. Normally, once a case is properly removed, the subsequent actions of the plaintiff will not divest the court of jurisdiction. However, a post-removal event that goes to the essence of subject matter jurisdiction may require remand. See, e.g., 14A Wright & Miller § 3723, at 324.

In the instant case, Plaintiffs, following removal, sought leave to amend their Complaint to assert that the Howells were stateless United States citizens. In the Court's view, the stipulations discussed above, in the absence of any evidence to the contrary, establishes the truth of these allegations. The presence of even one stateless United States citizen as a party destroys diversity.[11] Therefore, based on

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[10] For jurisdictional purposes, a United States citizen is a citizen of a state if he is domiciled within that state. Other than Plaintiffs' pleadings filed prior to removal, the record is barren of evidence that the Howells were domiciled in any state. The stipulations entered into by the parties indicate that their only legal domicile was in Korea. While it is true that residence is not, in all cases, the same as domicile, the fact that they resided in Korea coupled with the complete lack of evidence of a legal domicile in any state compels the conclusion that the Howell's were stateless.

[11] [F]or diversity purposes a United states citizen normally is considered to be a citizen of the state in which he has a legal domicile. Accordingly, it has been held consistently that a diversity suit may not be maintained under Section 1332(a)(1) by or against a United States citizen who is domiciled in a foreign country. Moreover, an American living abroad is not by virtue

the admissions of the parties, the Court must conclude that it lacks subject matter jurisdiction.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that that portion the Court's Order of May 3, 1993 denying Plaintiffs' Motion for Leave to Amend is hereby VACATED.

It is further ORDERED that Plaintiffs' Motion for Leave to Amend is GRANTED and Plaintiffs' previously offered Amended Complaint is hereby accepted and made a part of the record for all purposes.

It is further ORDERED that that portion of the Court's Order of May 3, 1993 denying Plaintiffs' Motion to Remand on the ground that Plaintiffs' were estopped from asserting that Plaintiff Linton is, in her representative capacity, a stateless United States citizen is VACATED.

It is further ORDERED that Plaintiffs' Motion to Remand is GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION on the ground that complete diversity does not exist between the parties because Plaintiff Linton is, in her representative capacity, a stateless United States citizen.

It is further ORDERED that this action is REMANDED to the state court from whence it came.

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of that domicile a citizen or subject of the foreign state in which he resides so as to permit invocation of the alienage jurisdiction prescribed in Section 1332(a)(2) of the Judicial Code. 13B Wright & Miller, § 3621, at 577-79 (footnotes omitted).

It is further ORDERED that THE PARTIES FILE NO FURTHER PLEADINGS IN THIS COURT.[12]

IT IS SO ORDERED.

DONE at Galveston, Texas this 24th day of June, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

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[12] As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA"). If that judgment is reversed on appeal, then the instant Order is a nullity. Assuming Defendants are foreign sovereigns, the Court would dismiss the action for lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. Alternatively, the Court would, as outlined above, dismiss this action for forum non conveniens.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	NO. G-92-102
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants;	§	
	§	
	§	CONSOLIDATED
	§	WITH
MR. & MRS. STAN MOSS	§	
ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	NO. G-92-103
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants.	§	

ORDER

Recently, the Court entered an Order of Remand in the aboved-captioned actions. In that Order, the Court stated that Plaintiffs had failed to respond to outstanding motions to dismiss for lack of personal jurisdiction. Due to an oversight, the Court was unaware that the relevant parties had stipulated to the Court's personal jurisdiction.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that that portion of the Court's Order of Remand addressing this Court's personal jurisdiction is VACATED FOR ALL PURPOSES.

It is further ORDERED that, to the extent that this Court presently lacks jurisdiction to enter such an Order, this Order shall

serve as notice to the court or courts with jurisdiction of the previous oversight.

It is further ORDERED that, to the extent this Court lacks jurisdiction, this Order will be effective immediately should this Court ever regain jurisdiction.

IT IS SO ORDERED.

DONE at Galveston, Texas this 8th day of July, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET AL., Defendants;	§	
	§	CONSOLIDATED WITH
MR. & MRS. STAN MOSS, ET AL., Plaintiffs;	§	CIVIL ACTION NO. G-92-103
VS.	§	
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

Before the Court is Plaintiffs' Motion to Remand and Motion for Leave to file Amended Complaint.[1] For the reasons stated below, the Court is of the opinion that both motions should be DENIED.

The action arises out of an air crash that occurred on or about February 14, 1990, in Bangalore, India. Plaintiffs

[1] **Plaintiffs' proposed Amended Complaint asserts that Plaintiff Linton in her representative capacity is a stateless United States citizen rather than a citizen of Maryland. See Part I(C), infra.**

initiated this action in Texas state court. Defendants subsequently removed to this Court. Defendants assert that 1) pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"), Defendant Airbus Industrie ("AI") and Defendant Aeroformation ("AeF") are each an agency or instrumentality of a foreign state; and 2) complete diversity exists between the parties. Therefore, Defendants contend, this action was properly removed pursuant to both 28 U.S.C. § 1441(d)[2] and 28 U.S.C. § 1441(a).[3]

The Court has previously held that, under the FSIA, neither AI nor AeF is an agency or an instrumentality of a foreign state. Linton v. Airbus Industrie, 794 F. Supp. 650 (S.D. Tex. 1992). The Court now considers whether this action was properly removed pursuant to 28 U.S.C. §§ 1332 and 1441(a). Plaintiffs assert three arguments in favor of remand. The Court considers each in turn.

First, Plaintiffs assert that Defendants failed to timely assert diversity as a ground for removal. This argument is specious.

On March 13, 1992, AI and AeF filed a Notice of Removal, which asserted only the FSIA and 28 U.S.C. §

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[2] Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. . . .

[3] Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

1441(d) as a basis for federal jurisdiction. Thereafter, on the same day, the other Defendants that had been served (except those allegedly fraudulently joined) filed a Notice of Removal asserting diversity as a jurisdictional basis. Plaintiffs argue that this second removal was a nullity because "the state court was already divested of jurisdiction by virtue of the first removal." Pl.s' Mot. Rem. at 12.

This argument is without merit. The removal of a case from state court is accomplished by unilateral acts (the filing of a Notice of Removal etc.) of the removing parties. No action by the state court is necessary, and, indeed, the state court's jurisdiction, or lack thereof, is irrelevant. *Cf.* 28 U.S.C. § 1441(e). Thus, while it is true that the removal of a case divests the state court of jurisdiction to conduct further proceedings,[4] it does not follow that multiple removals are therefore not allowed. See Albonetti v. GAF Corp.-Chem. Group, 520 F. Supp. 825, 828 (S.D. Tex. 1981) (holding that requirement that all defendants join in removal is satisfied if, following filing of notice of removal by one defendant, other defendants either timely join in first removal or file their own notices of removal).[5]

Moreover, even assuming that multiple removals are not allowed, Defendants amended their Notice of Removal to assert diversity as a basis for jurisdiction. A case may be removed within thirty days of the date the first defendant receives notice of the action. 28 U.S.C. § 1446(a).

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[4] See, e.g., 14A Charles A. Wright, et al., Federal Practice & Procedure § 3737, at 549-53 (2d ed. 1985) (footnotes omitted).

[5] Moreover, hypertechnical constructions of the removal statute are disfavored in this circuit, and thus, even assuming that multiple removals were not allowed, the Court would look to the substance of the second Notice of Removal, rather than the title, and treat it as an amendment to the original notice.

Thereafter, the removal petition may be amended any time within this thirty-day period. Richardson v. United Steelworkers, 864 F.2d 1162 (1989), cert. denied, 495 U.S. 946 (1990).

In the instant case, it is undisputed that the first defendant to receive notice sufficient to start the running of section 1446(b)'s thirty-day period received such notice on February 14, 1992. Thus, the thirty-day period began to run on February 15, 1992 and expired on March 15, 1992. Fed. R. Civ. P. 6(a). Because March 15 was a Sunday, however, Defendants had until the end of March 16, 1992 to amend their removal petition. Thus, Defendants' Amended Notice of Removal, which was filed on March 16, was timely.

B.

Next, Plaintiffs assert that diversity removal was improper because Plaintiffs Mr. & Mrs. Stan Moss, in their representative capacities, Defendant Airbus Services Company, Inc. ("ASC") and Defendant Honeywell Space Systems Support Group ("HSSSG") are all citizens of Florida. Defendants argue that HSSSG is not a legal entity and is therefore not capable of joinder as a party defendant and that ASC was fraudulently joined.

1. HSSSG

Defendants have presented uncontroverted evidence that HSSSG is an unincorporated division of Defendant Honeywell, Inc. and is not a separate entity. Therefore, the attempted joinder of HSSSG as a party defendant is not a bar to removal.

2. ASC

Defendants admit that ASC is a citizen of Florida but argue that it was fraudulently joined. In general, the fraudulent joinder of a nondiverse party will not defeat removal. However, to sustain removal, the removing party must demonstrate "that there is 'absolutely no possibility' that the nondiverse defendant will be liable to plaintiff in state court." Robinson v. National Cash Register Co., 808 F.2d 1119, 1123 (5th Cir. 1987) (quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984)).

In the instant case, construing Plaintiffs' Complaint in the light most favorable to them, Plaintiffs assert that removal was improper because ASC is an "alter ego" of either AI or AeF.[6] Because a corporation is deemed to be a citizen of the state, or states, in which its "alter ego" is incorporated, AI or AeF, whichever is the parent corporation, is a citizen of Florida, and, consequently, complete diversity is lacking.

Apparently, however, Plaintiffs misapprehend the nature and scope of the "alter ego" doctrine. In general, the corporate form insulates the owners, directors, and officers of a corporation from individual liability for acts committed by the corporation. Under certain circumstances, however,

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[6] Plaintiffs' Complaint alleges that AI, AeF, ASC, and Defendant Airbus Industrie of North America are all "sham corporate structures, failed to follow corporate formalities and as such, the act of one is the act of the other and their corporate identities should be disregarded. Such an allegation is silly: corporations cannot be the "alter egos" of one another. Elsewhere, Plaintiffs allege that ASC was controlled by AeF and allege other allegations against AI. Therefore, the Court will treat Plaintiffs' "alter ego" allegations as allegations that ASC is the "alter ego" of AI or AeF.

courts will disregard the corporate fiction and hold some or all of the owners, directors, etc. liable for actions ostensibly undertaken on behalf of the corporation. The "alter ego" doctrine allows a court to disregard the corporate fiction because the degree of unity between the corporation and its owners is such that the corporation has ceased to be a separate entity and holding only the corporation liable would result in injustice. See, e.g., Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986). For jurisdictional purposes, the "alter ego's" owners, directors, and the like are treated as citizens of the state, or states, of which the "alter ego" is a citizen. Panalpina Welttransport GMBH v. Geosource, Inc., 764 F.2d 352, 353 (5th Cir. 1985).

The "alter ego" doctrine does not, however, allow a plaintiff to seek recovery from an alleged "alter ego" for acts taken on behalf of an owner, director, etc. of the "alter ego." Thus, even assuming that ASC is an "alter ego" of AI or AeF or both, this fact is not significant unless Plaintiffs seek to hold AI or AeF liable for an act committed by ASC. In other words, for jurisdictional purposes, regardless of the relationship between AI, AeF, and ASC, neither AI nor AeF will be treated as a citizen of Florida unless Plaintiffs seek to hold either or both liable for an act of ASC.

In the instant case, Plaintiffs have not alleged that either AI or AeF is so liable. Rather, Plaintiffs make general, conclusory assertions of liability against AI, AeF, ASC, and Defendant Airbus Industrie of North America sounding in negligence and strict liability and a general assertion that some sort of "alter ego" relationship exists between these Defendants. By contrast, Defendants have presented uncontroverted evidence that ASC did not 1) design, specify, manufacture, fabricate, assemble, market, promote, distribute, test, supply, sell, or otherwise place into the stream of commerce the aircraft involved in the accident

underlying this litigation or any of its component parts; 2) train or certify any of the pilots involved in that accident; or 3) make any written or oral warranties regarding the aircraft or the pilots. While Plaintiffs' allegations might, in the first instance, be sufficient to withstand a motion to dismiss for failure to state a claim,[7] Defendants' uncontroverted evidence establishes that there is absolutely no possibility that Plaintiffs will recover from ASC in state court. The fact that ASC may be the "alter ego" of AI or AeF is irrelevant to this determination: the "alter ego" doctrine simply does not apply in this case.

Third, Plaintiffs assert that complete diversity does not exist because Andrew and Sarah Howell (the Howells"), the parents of Plaintiff Laura Howell Linton, were stateless citizens of the United States. As the Personal Representative of the Howells' estates, Plaintiff Linton, in her representative capacity, is also stateless for jurisdictional purposes.[8] Because the presence of a stateless citizen of the United States on either or both sides of a controversy destroys diversity, complete diversity does not exist in this case.

Plaintiffs are correct that the presence of even one stateless United States citizen as a party destroys diversity.

> [F]or diversity purposes a United States citizen normally is considered to be a citizen of the state in which he has a legal domicile. Accordingly, it has been held consistently that a diversity suit may not be

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[7] However, it must be remembered that "Texas courts are loathe to merge the separate legal identities of a parent and subsidiary . . . ." Miles v. American Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir. 1983).

[8] 28 U.S.C. § 1332(c)(2) provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ."

> maintained under Section 1332(a)(1) by or against a United States citizen who is domiciled in a foreign country. Moreover, an American living abroad is not by virtue of that domicile a citizen or subject of the foreign state in which he resides so as to permit invocation of the alienage jurisdiction prescribed in Section 1332(a)(2) of the Judicial Code.

13B Wright & Miller, supra, § 3621, at 577-79 (footnotes omitted).

However, according to both the original state-court petition and the state-court pleadings on file at the time of removal, Plaintiff Linton was a resident of Maryland. Thus, diversity removal was proper. Id. § 3723, at 312 (removal based on diversity proper if complete diversity exists at the time of filing and at the time of removal). The general rule is that once a case is properly removed, the subsequent actions of the plaintiff will not divest the federal court of jurisdiction. In the instant case, the Court does not believe that Plaintiffs' attempt to reallege the relevant jurisdictional facts requires remand.

The facts relating to the Howells' domicile were, or should have been, within the knowledge of Plaintiffs at the time this suit was filed. Thus, in the Court's view, Plaintiffs' new allegation that the Howells' domicile was in Korea is suspect, especially given that Plaintiffs offer no reason for their failure to so allege prior to removal.

The Court recognizes that a post-removal event that goes to the essence of subject matter jurisdiction, such as the addition of an indispensable, nondiverse party, may require remand. Id. at 324. Such is not the case here, however. At all relevant times, Plaintiffs knew, or should have known, of the relevant jurisdictional facts. Defendants were entitled to

rely on Plaintiffs allegations, and Plaintiffs will not, following a proper removal, be heard to allege different jurisdictional facts regarding themselves that would, if accepted, defeat diversity.

D.

Finally, Plaintiffs argue that, even if complete diversity exists, removal was barred by 28 U.S.C. § 1441(b) because Defendant FlightSafety Texas, Inc., ("FST") is a citizen of Texas.[9] Defendants do not dispute this contention but assert that FST was fraudulently joined. Plaintiffs assert that FST was properly joined because FST is an "alter ego" of Defendant FlightSafety International, Inc. ("FST").[10] Defendants, however, have submitted unrebutted evidence that FST did not exist as of the date of the accident underlying this suit, and there is no allegation or evidence that FST was created (subsequent to the accident) merely to shield FSI from liability. Thus, despite Plaintiffs' allegations of negligence against FST, the Court can say that there is no way Plaintiffs will be able to recover from FST in state court. Therefore, FST was fraudulently joined, and removal was not barred by 28 U.S.C. § 1441(b).

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[9] Under section 1441(b), a diversity case is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action if brought."

[10] Although Plaintiffs' allege negligence against both FSI and FST, it is not alleged that FSI is liable to Plaintiffs because of a tort committed by FST. Therefore, the "alter ego" doctrine has no application.

II.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Leave to File Amended Complaint is DENIED.

It is further ORDERED that Plaintiffs' Motion to Remand is DENIED.

It is further ORDERED that the parties file no further pleadings on this issue in this Court. In particular, the Court will not consider any motions for reconsideration or the like.

It is further ORDERED that, consistent with the Court's prior Order, Plaintiffs' have ten days from the date of this Order to respond to all outstanding dispositive motions (e.g., motions to dismiss and motions for summary judgment). The Court will grant no extensions of time for the filing of such responses.

IT IS SO ORDERED.

DONE at Galveston, Texas this 30th day of April, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	No. G-92-102
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants;	§	
	§	CONSOLIDATED
MR. & MRS. STAN MOSS, ET AL.,	§	WITH
Plaintiffs;	§	
VS.	§	CIVIL ACTION
AIRBUS INDUSTRIE, ET AL.,	§	No. G-92-103
Defendants.	§	

ORDER

This action arises out of an aircrash that occurred on or about February 14, 1990, in Bangalore, India. Plaintiffs initiated this action in Texas state court. Defendants subsequently removed to this Court, and, thereafter, Plaintiffs moved to remand.

Defendants Airbus Industrie ("AI"), Aeroformation ("AeF"), Airbus Industrie of North America, Inc., and Airbus Service Company, Inc.,[1] argue that removal was proper under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, because AI and AeF are "foreign states" within the meaning of FSIA. For the reasons stated below, the Court does not agree.

I.

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[1] Hereinafter referred to collectively as the "Airbus Defendants."

28 U.S.C. § 1441(d) provides that

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending....

Thus, this action was properly removed if AI or AeF or both is a foreign state with the meaning of FSIA.

The Airbus Defendants argue that AI and AeF are foreign states for purposes of FSIA because each is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603. Section 1603 provides, in part,

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state ....
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

II.

This Order considers only whether the second requirement

of section 1603(b) is satisfied. The Airbus Defendants contend that "a majority of the shares or other ownership interest" of both AI and AeF are owned by "a foreign state or a political subdivision thereof." However, it is undisputed that no single foreign state has more than a 50% ownership interest in AI. The Airbus Defendants argue, however, that where an entity is owned by several entities which are themselves at least partially owned by foreign states, the various foreign government ownership interests may be pooled together for purposes of determining whether a majority of the shares or other ownership interest is owned by a foreign state.

Defendants correctly point out that every court that has considered the issue has approved this type of pooling.[2] For example, in *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D.Va. 1988) the court held that FSIA applied to a suit against a foreign airline that was owned by four Persian Gulf states, notwithstanding that no single state owned more than 50% of the airline. Similarly, in *Rios v. Marshall*, 530 F.Supp. 351 (S.D.N.Y. 1981), the court held that British West Indies Central Labour Organization, an unincorporated association serving as the administrative arm of the Caribbean Regional Labour Board, was an instrumentality of its members for purposes of section 1603(b)(2). Also, in *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F.Supp. 553 (C.D.Cal 1979) ("OPEC"), the court apparently assumed, without explicitly holding, that OPEC is covered by FSIA.

The instant case, however, differs from these cases in one important respect. In *LeDonne*, *Rios*, and *OPEC* each owner which was allowed to pool its interest for purposes of satisfying section 1603(b)(2)'s 50% requirement was itself a foreign state as defined by FSIA. Had an individual owner been sued or had any of the individual owners owned more than 50% of the entity that was sued, FSIA would have unquestionably applied.

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[2] Neither the Fifth Circuit nor the Supreme Court has considered the issue.

Not so in the instant case. AI is owned by four corporations. Two of these corporations, which, according to Defendants' calculations,[3] own 42.1% of AI, are controlled by foreign states. Another owner, which controls 20% of AI, is privately owned. The remaining 37.9% is owned by Deutsche Airbus GmbH ("DA"). Thus, assuming that pooling is allowed, the critical question is whether this interest can be pooled with the 42.1% owned by foreign states. If so then FSIA applies; otherwise it does not.

DA is owned by two companies. 20% is owned by Kreditanstalt fur Wiederaufbau ("KfW"), an agency of the German government. The remaining 80% is owned by Messerschmitt-Bolkow-Blohm ("MBB"), a German corporation. Only 36.56% of MBB's shares are owned by foreign states. The other 63.44% privately owned. Thus, only 49.25% of DA's shares are owned by foreign states.

The Airbus Defendants argue that this is irrelevant. To determine whether more than 50% of the shares or other ownership interest of an entity is owned by a foreign state or states, the Court need only consider the total amount owned by foreign states, and need not consider whether the entities contributing ownership interests to be pooled together are themselves foreign states. In the Airbus Defendants' view, since 60.04% of AI's shares are owned by foreign states, it is a foreign state, even though more than 10.04% this ownership interest is asserted through companies a majority of whose shares are held by private owners. Similarly, since 90% of AeF is owned by AI, AeF is also a foreign state.

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[3] Plaintiffs dispute the accuracy and admissibility of several of the Airbus Defendants' calculations. Because the Court has determined that FSIA does not apply even if these calculations are correct, the Court accepts the Airbus Defendants' calculations for purposes of this Order only. The Court does not reach any of Plaintiffs' objections, however, and the use of the Airbus Defendants' calculations for purposes of this Order does not imply any final acceptance.

In the Court's view, the Airbus Defendants' position is difficult to reconcile with either the plain language or the structure and purpose of FSIA. First, it is far from clear that pooling is allowed under FSIA. To approve pooling, the Court must assume that FSIA applies to entities 50% or more of whose shares are owned by foreign states, even though no single foreign state owns more that 50%. Section 1603, however, speaks only of entities 50% or more of whose shares are owned by a foreign state, singular. Arguably, had Congress wished to permit pooling, it could have easily defined a foreign state as an entity 50% or more of whose shares are owned by a foreign state or states. Because Congress did not so define foreign state, it is not for the courts to substitute this definition for the one provided.

Moreover, even assuming that pooling is permitted, it is one thing to say that where an entity is owned by several other entities, FSIA applies to the first entity if more than 50% of its shares are owned by entities which are themselves foreign states. It is quite another thing to say that entities which are not foreign states or their instrumentalities may nevertheless pool their ownership interests in another entity such that FSIA applies to the latter.

Obviously FSIA applies to foreign states. Likewise, under section 1603, an entity 50% or more of whose shares are owned by a foreign state is itself a foreign state. In the Court's view, although reasonable minds could disagree, it does not do too much violence to either the plain language or the spirit of FSIA to hold that foreign states may pool their interests in an entity for purposes of determining whether that entity is a foreign state under FSIA. FSIA would unquestionably apply if any owner were a party or if more than 50% of the entity in question were owned by any single foreign state. It is not, therefore, too much of a stretch to assume that Congress intended FSIA to apply to an entity owned by several foreign states, even if no single foreign states owns a majority; a majority of the entity's stock or other ownership interest is still owned by foreign states to which Congress clearly intended FSIA to apply.

Just as clearly, however, FSIA does not apply to entities that are not foreign states, nor does it apply to entities owned by entities which are not foreign states. In the Airbus Defendants' view, however, FSIA may apply to an entity, even if a majority of the shares of that entity are owned by an entity which is not a foreign state. For example, if 48% of the shares of "Entity A" are owned by a foreign state, and "Entity B" is wholly owned by "Entity A," FSIA does not apply to either. Under the Airbus Defendant's approach, however, if "Entity A" sells 5% of the shares of "Entity B" to another entity which is entirely owned by a foreign state, FSIA will apply to "Entity B," *even though 95% of the shares of "Entity B" are owned by an entity which is not a foreign state and which is explicitly excluded from the protections of FSIA*. That more than 50% of the total ownership of "Entity B" is controlled by one foreign state or another does not negate the fact less than 5% of Entity B's shares are actually owned by a foreign state.

The notion that FSIA apples under these circumstances is inconsistent with the statute's text and purpose. By defining "foreign state" as an entity 50% or more of whose shares are owned by a foreign state, Congress clearly indicated its intention that FSIA apply only to those entities wherein a majority interest is owned by a foreign state. To accept the Airbus Defendants' arguments would severely eviscerate the 50% requirement. Quite simply, and in direct contradiction to the statute's plain language, FSIA would apply to numerous entities even though less than 50% of their shares were owned by a "foreign state" *as Congress has chosen to define that term.* The Court finds nothing to indicate that Congress intended that FSIA be so applied.[4] No court has

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[4] The enactment of FSIA did not create a new federal cause of action or change the substantive law concerning the liability of foreign states. *First Nat'l City Bank v. Banco Para El Comercio Exterior*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Rather, in enacting FSIA, Congress intended only to codify the restrictive theory of sovereign immunity. *See, e.g., LeDonne v. Gulf Air, Inc. supra*, 700 F.Supp. at 1405. The Court has found no pre-FSIA cases approving the type of pooling suggested by the Airbus Defendants, or, indeed, any type of

ever approved an such application,[5] and the Court, in the absence of any Congressional directive whatsoever, declines to craft a new rule that would substantially broaden the reach of FSIA.

Therefore, the Court holds that the Airbus Defendants have not met their burden of proof; FSIA does not apply to Airbus

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pooling.

[5] The Airbus Defendants argue that the unreported decision in *Aluminum Distrib., Inc. v. Gulf Aluminum Rolling Mill Co.*, No. 87-C-6477, 1989 WL 64174 (N.D.Ill. June 8, 1989) ("GARMCO") supports their position. It does not. In GARMCO the ownership of the defendant's stock was as follows: Bahrain owned 25.47%; Iraq owned 11.32%; Oman owned 5.66%; Qatar owned 5.55%; Gulf Investment Corporation, a Kuwait shareholding company owned by Bahrain, Saudi Arabia, Oman, Qatar, Kuwait and the United Arab Emirates, owed 14.5%; and Saudi Basic Industries Corp., 70% of whose ownership was heid by Saudi Arabia, owned 20.75%. In addition, 16.98% was owned by the Industrial Bank of Kuwait, which was 31.4% owned by Kuwait.

The Airbus Defendants assert that, given this last fact, GARMCO can be read as support for the proposition that entity's which are partially owned by foreign states but are not themselves foreign states may nevertheless pool their ownership interest in a third entity for purposes of determining whether that third entity is a foreign state for FSIA purposes. Nowhere in its opinion, however, does the GARMCO court reach such a conclusion. Instead, the court merely stated in its recitation of facts, the fact that the 16.98% of the defendant's shares were held by the Industrial Bank of Kuwait. The court then rejected the plaintiff's contention that to be a foreign state, more than 50% of an entity's shares must be held by a single foreign state and held that the defendant was a foreign state. In GARMCO, in contrast to the instant case, more than 50% of the defendant's shares were owned by entities *which were themselves foreign states*. Thus, the court did not need to consider whether the Industrial Bank of Kuwait could pool its ownership interests with the others, and consequently, the court did not address this issue.

Industrie and Aeroformation because Deutsche Airbus GmbH is not a foreign state for purposes of FSIA.[6]

IT IS SO ORDERED.

DONE at Galveston, Texas this 21st day of July, 1992.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT COURT

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[6] Similarly, in the Court's view, MBB, which owns 80% of DA, should not be allowed to pool its interest because it is also not a foreign state.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs,	§	
v.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET.AL., Defendants.	§	
MR. & MRS. STAN MOSS, ET AL., Plaintiffs,	§	CONSOLIDATED WITH
v.	§	CIVIL ACTION NO. G-92-103
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

This Court grants the Airbus Defendants' Motion to Stay. This Court's order of remand, dated June 24, 1993, is stayed pending final determination of the Airbus Defendants' Foreign Sovereign Immunities Act appeal.

SIGNED this 29th day of June, 1993.

/s/ Samuel B. Kent
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7479

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION,
Defendants-Appellants.

* *

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/16/94, 5 Cir., 1994, ____ F.3d ____)

(09/13/94)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
United States Circuit Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7479

D.C. Docket No. CA G92 102 c/w G92 103

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION,
Defendants-Appellants.

* * * * * * * * * * * * * * * * * *

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIES and AEROFORMATION,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, KING, and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjuged by this Court that the appeal in this cause is dismissed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: August 16, 1994

APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CA-G-92-102

No. 92-7564

AIRBUS INDUSTRIE, ET AL.,
Appellants/Defendants,

versus

LAURA HOWELL LINTON, ET AL.,
Appellees/Plaintiffs.

Appeal from the United States District Court
for the Southern District of Texas

(February 24, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss appeal is GRANTED.

The district court's finding—that the Foreign Sovereign Immunities Act (FSIA"), 28 U.S.C.A. § 1602 *et seq.* (West Supp. 1992) "does not apply to Airbus Industrie and Aeroformation [("Airbus Defendants")] because Deutsche Airbus GmbH is not a foreign state for the purposes of FSIA"—did not dispose of plaintiffs' motion to remand nor

Airbus defendants' various motions to dismiss. *See Linton v. Airbus Industrie*, 794 F. Supp. 650, 653-54 (S.D.Tex. 1992). Accordingly, the district court's order is neither final nor appealable under 28 U.S.C. § 1291 (1988). *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, — U.S. —, 113 S. Ct. 684, 687 (1993) ("Appeal is thereby precluded 'from any decision which is tentative, informal or incomplete,' as well as from any 'fully consummated decisions, where they are but steps towards final judgment in which, they will merge.'" (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L. Ed. 1528 (1949))).

Moreover, the Airbus defendants failed to seek certification of the district court's order pursuant to 28 U.S.C. § 1292(b) (1988) for discretionary review by this Court. Accordingly, this Court lacks appellate jurisdiction pursuant to 28 U.S.C. § 1292.

Lastly, we have not found, nor have we been referred to, any authority to support that the district court's preliminary finding—that FSIA does not apply to Airbus Industrie and Aeroformation—is appealable under the collateral order doctrine, absent a ruling on the motion before it. *See United States v. Moats*, 961 F.2d 1198, 1201 (5th Cir. 1992) (finding that the court had appellate jurisdiction from a non-final order denying a motion to dismiss based on FSIA immunity). The district court having failed to determine Airbus defendants' motions to dismiss, we lack jurisdiction under the collateral order rule. *See id.* (finding appellate jurisdiction under the collateral order doctrine where no other pending motions before it.

On remand, the district court should rule on plaintiffs' motions to remand and defendants' motions to dismiss expeditiously.

ISSUED AS MANDATE: MAR 29 1993

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7564

LAURA HOWELL LINTON,
Individually, Etc., ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE, AIRBUS INDUSTRIE OF NORTH AMERICA, INC., ET AL.,
Defendants-Appellants.

* * * *

MR. AND MRS. STAN MOSS,
Individually, Etc.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE, AIRBUS INDUSTRIE OF NORTH AMERICA, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

(March 18, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for reconsideration of this Court's order of February 24, 1993 dismissing the appeal is denied.

Supreme Court, U.S.
FILED
NOV 16 1994
CLERK

No. 94-684

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

AIRBUS INDUSTRIE, ET AL.,

Petitioners,

V.

LAURA HOWELL LINTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1447(d) bars appellate review of an order of remand based on lack of jurisdiction where the removing party failed to prove its right to remove under the Foreign Sovereign Immunities Act.

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NO. 94-684

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

AIRBUS INDUSTRIE, ET AL.,

Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,

Respondents.

BRIEF IN OPPOSITION

Respondents, Laura Howell Linton, *et al.*[1], respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Fifth Circuit's opinion below. That opinion is reported at 30 F.3d 592 (5th Cir. 1994) and is reprinted in the petition for certiorari at Appendix A.

[1]The full list of respondents is included in the "Parties" section of the petition for certiorari.

STATUTES INVOLVED

28 U.S.C. § 1447(d) provides:

> An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title [civil rights cases] shall be reviewable by appeal or otherwise. (brackets supplied)

STATEMENT OF THE CASE

In March, 1992, Airbus Industrie and Aeroformation (the "Airbus Defendants") removed separate wrongful death actions filed in Texas state court to federal court based upon the allegation of federal question jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 ("FSIA") and diversity jurisdiction.

The Airbus Defendants based their right to FSIA removal solely upon a contention that they were a "foreign state" -- despite the undisputed fact that no foreign state owned a majority interest in those entities. *See* 28 U.S.C. § 1602(b)(2). This "foreign state" contention depended upon a convoluted three-tiered formula in which the defendants asserted that, although they were owned by entities which were not themselves foreign states, those entities had minority interests by foreign states that, when pooled together, equaled a "foreign state" for the purposes of the FSIA. The district court found, even assuming for the sake of argument that the

defendants' calculations were correct[2], that the defendants had failed to prove that they were a "foreign state" for the purposes of the FSIA. *See* Petition, at E-7. Contrary to the petitioners' assertion, this order did not deny immunity under the FSIA nor did it address the petitioners' pending motions to dismiss. The order merely addressed the question of proper removal jurisdiction.

The Airbus Defendants attempted an interlocutory appeal of that order, but the Fifth Circuit dismissed that appeal and held that the FSIA order was not final nor appealable, that the defendants had not sought certification and that the collateral order doctrine[3] did not apply. *See* Petition, at I-1,2. The Fifth Circuit specifically found that the order "*did not* dispose of plaintiffs' motion to remand nor Airbus Defendants' various motions to dismiss." *Id.* (emphasis added).

After that appeal, the district court first denied remand based on diversity but later granted remand based upon a

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[2] The plaintiffs disputed the accuracy and admissibility of the defendants' calculations and presented other evidence which proved that even under defendants' convoluted formula, there was no majority interest. The district court accepted the defendants' calculations only for the purposes of the order and made no final resolution of the matter. *See Linton v. Airbus Industrie*, 794 F.Supp. 650, 652 n.3 (S.D. Tex. 1992), *appeal dism'd*, 30 F.3d 592 (5th Cir. 1994).

[3] The collateral order doctrine permits interlocutory appeals if an order "conclusively" determines the disputed question, resolves an important issue "separate from the merits of the action," and is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

stipulation of citizenship filed by the defendants. *See* Petition, at B-9. Based upon that admission, the district court concluded "that it lacks subject matter jurisdiction." *Id.* at B-10[4].

The district court expressly ordered that plaintiffs' motion to remand is "GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION" *Id.* (capitals in original)

Notwithstanding the acknowledged bar to appellate review of orders of remand based on lack of jurisdiction contained in 28 U.S.C. § 1447(d), the Airbus Defendants attempted to invoke appellate jurisdiction under direct appeal, the separable order doctrine, a recall of the prior mandate, the collateral order doctrine, and mandamus. The Fifth Circuit found that the district court's FSIA order was a "jurisdictional finding under the facts of this case and, as such, can be reviewed by the state court upon remand." *See* Petition, at A-11. Since neither the separable order doctrine nor any other theory applied to avoid the section 1447(d) bar to review, the Fifth Circuit dismissed the appeal.

In this petition, the Airbus Defendants argue only that the separable order doctrine applies to circumvent section 1447(d)'s well-established bar to appellate review. A review of the facts of this case and relevant authorities reveals that the doctrine does not apply and that certiorari should be denied.

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[4] The petitioners do not contend in their petition that the district court's finding that there was no diversity jurisdiction was erroneous.

REASONS TO DENY THE WRIT

I. The Fifth Circuit Correctly Held That The District Court's Remand Order Was Unreviewable On Appeal.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the question presented. The petitioners' question presented suggests that the district court below issued a separable order "denying a party's claim of immunity from suit under the Foreign Sovereign Immunities Act." *See* Petition, "Question Presented For Review," at i. This suggestion is incorrect.

The district court never ruled on the Airbus Defendants' motions to dismiss for immunity because the court found that it lacked subject matter jurisdiction to do so and remanded the case. The Airbus Defendants can point to no order in this record in which the district court denied their claim of FSIA immunity. As the Fifth Circuit found, the district court's FSIA order was a non-final, non-preclusive jurisdictional finding, which decided only that the defendants had failed to meet their burden to prove their claims of removal jurisdiction.

Of course, if the district court *had* issued a final order which denied the Airbus Defendants' claim of FSIA immunity, then such an order would be appealable under the "collateral order" doctrine. *See e.g. Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385 (5th Cir. 1991); *Rush Presbyterian-St. Lukes Medical Center v. The Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 333 (1990); *Compania Mexicana de Aviacion v.*

United States District Court, 859 F.2d 1354, 1358 (9th Cir. 1988); *Gould, Inc. v. Pechiney Ugine Kuhlman & Trefimetaux*, 853 F.2d 445, 450 (6th Cir. 1988).

But because there was no final, conclusive denial of FSIA immunity in this case, the defendants cannot take solace in the "collateral order" doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Thus, they attempt to manufacture a "separable order" premise to invoke appellate review. As the Fifth Circuit found, this premise does not "hang together." *See* Petition, at A-8.

Review is precluded here because the district court's jurisdictional findings in conjunction with an order of remand are immunized from appellate review by 28 U.S.C. § 1447(d), even if those findings are clearly erroneous. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 723-24 (1977) (per curiam) (review precluded even if the district court "employed erroneous principles in concluding that it was without jurisdiction"). This has been the rule since 1887. *Thermtron Products, Inc.*, 423 U.S. at 343.

The rationale behind this long established rule was succinctly stated by Chief Justice (then Justice) Rehnquist in 1976:

> If anything is clear from the history of the prohibition against review, it is that Congress decided that potential errors in individual cases did not justify permitting litigants to challenge remand orders. To carry out its policy of avoiding further interruption of the litigation of removed causes, properly begun in state courts...Congress decided to place final responsibility for implementation of its removal scheme with the district courts.

Id. at 360-61 (Rehnquist, J., dissenting). The Fifth Circuit recognized and reaffirmed this rule in its opinion below.

The Airbus Defendants also suggest that this case should somehow be different because removal was predicated on the FSIA. This suggestion that the rule should apply differently for different categories of cases was rejected by this Court in 1946. *See United States v. Rice*, 327 U.S. 742 (1946). There, removal was predicated not on the general removal statutes then in effect, but on a special removal statute which involved federally restricted land interests of an Indian. In response to an argument that the forerunner of section 1447(d) did not apply to this special statute, the Court held that the bar to appellate review was "intended to be applicable not only to remand orders made in suits removed under [the general removal statutes], but to cases removed under any other statutes, as well." *Id.* at 752; *see also Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993) ("Section 1447(d) predated FSIA and its removal provision, but Congress

made no exception for appellate review of a remanded FSIA case, as it has done for civil rights and FDIC cases.")

The district court below found that the defendants had failed to prove their right to FSIA removal and the court remanded the case. Under section 1447(d), the district court's findings, even if erroneous, are not reviewable on appeal. For this reason, the Fifth Circuit was correct and the petition for certiorari should be denied.

II. The Fifth Circuit's Opinion Is In Harmony With Other Circuits Since The FSIA Finding Was Jurisdictional And Not Preclusive.

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict where there is none. Not a single one of the cases which the petitioners cite as being in conflict with the decision below involved FSIA removal or even similar facts. All involve carefully delineated and narrow exceptions that do not apply to the facts of this case. The petitioners have attempted to merge these narrow exceptions together into a single expansive doctrine which they call the "separable order" doctrine.

As an analysis of those cases reveals, the petitioners' "separable order" doctrine is in reality a number of doctrines, each of which apply to a unique and narrow set of facts -- facts which are not presented here.

Since there is no direct, real or intolerable conflict among Circuits on the issues presented, there is no foundation for review.

A. This Case Does Not Fit Within The *Waco* Exception Since There Was No Preclusive Denial Of Immunity.

The Airbus Defendants base their "separable order" premise on this Court's opinion in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In *Waco*, this Court permitted review of an order of dismissal of a cross-claim since that order "in logic and in fact" preceded the remand order and was "conclusive" on the substantive rights of the petitioner to reassert the cross-claim. *Id.* at 143.

In the present case, there was no dismissed claim nor any order which "in logic and in fact" was "separable" from the district court's jurisdictional determinations regarding remand. *See Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) (good discussion of the applicability of the *Waco* doctrine). And, as the Fifth Circuit stated, the FSIA conclusions about which the petitioners complain "were jurisdictional under the facts of this case; they thereby have no preclusive effect on the state courts." *See* Petition, at A-13.

In contrast to the petitioners' representations, the district court did *not* deny their claim of FSIA immunity. The district court never ruled on their motions to dismiss because the court found that the petitioners, in the first instance, had not met their burden to prove their right to removal. Since the district court found that it had no subject matter jurisdiction, the district court had no authority to rule on the petitioners' substantive defenses. *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 483 F.2d 1341, 1346 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989).

The Fifth Circuit's holding that jurisdictional findings issued incident to a remand order have no preclusive effect on a party's substantive rights is the rule followed by almost all of the Circuits that have considered the issue. *See Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993) (collecting cases). Since federal law determines the preclusive effect of federal orders -- regardless of whether the court applying the judgment is state or federal -- the Fifth Circuit's holding that the district court's FSIA order is jurisdictional and non-preclusive will permit the petitioners to raise FSIA immunity again in state court. *See id.* at 321-22.

Since the FSIA order did not deny immunity and is not "conclusive" of that issue, the *Waco* doctrine does not apply[5].

B. This Case Does Not Fit Within The *TMI* Exception Since There Was No Finding Of Unconstitutionality.

Another case relied upon by the petitioners for conflict is *In re TMI Litigation Cases*, 940 F.2d 832 (3d Cir. 1991), *cert. denied* 112 S.Ct. 1262 (1992). In that case, the Third Circuit held that, although normal remand orders are unreviewable under section 1447(d), an appellate court can review a remand order in which the district court finds the

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[5] In *Waco*, the court recognized that the dismissal order could be reviewed but not the remand order, which was unreviewable by statute. 293 U.S. at 143. The Third Circuit, in a case also relied upon by the petitioners for conflict, extended *Waco* to a review of the remand order as well. *See Carr v. American Red Cross*, 17 F.3d 671, 679 (3d Cir. 1994). However, even under *Carr*, the order to be reviewed must be "final" and "conclusive" and must satisfy the finality requirements of the collateral order doctrine. *Id.* at 675. Under *Carr*, an order is not "final" if, as here, it can be reviewed by the state court. *Id.* at 677.

removal statute unconstitutional. *Id.* at 845. The Third Circuit recognized that the question presented there was "unique" and the court emphasized that its conclusion "is a narrow one and should in no way frustrate the policy underlying section 1447(d)." *Id.* at 847. Other Circuits have held that this exception to unreviewability does not apply unless the district court makes constitutional rulings. *See e.g. Nutter,* 4 F.3d at 323.

In the present case, the district court made no rulings on the constitutionality of the removal statute, so the *TMI* exception is not in conflict and does not apply.

C. This Case Does Not Fit Within The *Pelleport/Clorox* Exception Since The Remand Order Was Based On Lack Of Jurisdiction.

Finally, the petitioners attempt to set up a conflict with the Ninth Circuit and the Sixth Circuit by reliance upon the so-called "*Pelleport/Clorox*" exception. *Pelleport* involved a remand based not on lack of jurisdiction but on the parties' prior agreement in a forum selection clause. *Pelleport Investors v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984). Similarly, *Clorox* involved a remand based not on lack of jurisdiction but on the contractual waiver not to remove found in an employee handbook. *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985). In both of these cases, the Ninth Circuit held that since the remand order was not based upon lack of jurisdiction but on a forum selection issue separate and apart from any jurisdictional decision, the remand orders could be reviewed. *Pelleport*, 741 F.2d at 277; *Clorox*, 779 F.2d at 520.

The Sixth Circuit case, which petitioners also allege is in conflict with this case, was also a forum selection clause case which expressly applied the *Pelleport/Clorox* exception. *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). In fact, this forum selection clause exception is uniformly followed by the majority of the Circuits -- *including* the Fifth Circuit. *See e.g. McDermott Int'l, Inc. v. Lloyds Underwriters,* 944 F.2d 1199, 1203 n. 5 (5th Cir. 1991); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), *cert. denied*, 112 S.Ct. 302 (1991); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988).

But, the present case has nothing to do with a forum selection clause. The remand here was expressly based on lack of subject matter jurisdiction. Since the remand here was based on lack of jurisdiction as stated in the remand order, section 1447(d) precludes appellate review. *Pelleport*, 741 F.2d at 276 ("a district court's decision that it lacks subject matter jurisdiction to hear a case is not reviewable"); *Clorox*, 779 F.2d at 520 (Section 1447(d) bars review of "those remand orders which are based on lack of jurisdiction"). Other Circuits have also held that the *Pelleport/Clorox* exception is a "narrow one" and "expressly does not permit review of a remand order based on lack of jurisdiction." *See e.g. Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993) (dismissing similar attempts to extend the exception as "too facile").

Since the *Pelleport/Clorox* exception also does not conflict with the decision below and also does not apply on these facts, the petition should be denied.

III. The Fifth Circuit Opinion Will Not Produce Anomalous Results Since It Was Based On Its Own Facts.

Even though the petitioners will still have an opportunity to raise their "foreign state" theory in the state court on remand, the petitioners claim that review is required to eliminate "bizarre" or "disastrous" results. The petitioners provide two examples.

In the first example, the petitioners contend that one Circuit held that ICI was a foreign state under the FSIA while another did not. *Compare In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n. 8 (3rd Cir.), *cert. denied*, 63 U.S.L.W. 3009 (U.S. Oct. 3, 1994), *with Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993). The petitioners fail to point out that in the first case, ICI had been taken over by the Irish government while in the latter case, ICI's acts occurred while it was still a private entity. *See PCB Litigation*, 15 F.3d at 1245; *Mobil Corp.*, 984 F.2d at 665.

In the second example, the petitioners cite a district court case which is now under appeal. *Kern v. Jeppesen Sanderson, Inc.*, No. 14-93-3065 (S.D. Tex., June 13, 1994, *appeal pending*). The petitioners contend that the *Kern* case conflicts with the present case since in *Kern*, the district judge found that Airbus *was* a foreign state. What the petitioners fail to point out is that, after they lost that issue in this case and in an effort to distinguish this decision, the petitioners presented the second federal judge with a different time frame and a different calculation of ownership interests. *See* "Airbus Defendants' Consolidated Memorandum In Support of Consolidated Motion to Dismiss" at 11-12 and 13 n.11 (arguing

that the "operative date" for foreign state status in *Kern* was 1977, instead of 1989, and that "[t]his Court is not presented here with the ownership problem that troubled the court in [*Linton*]"), filed November 30, 1993 in *Kern v. Jeppesen Sanderson, Inc.*, H-93-3065 (S.D. Tex). Each case was based upon its own facts.

Further, the petitioners have failed to point out that the FSIA Order, which they so loudly decry, never made a final factual resolution of the asserted ownership interests. *See Linton*, 794 F.Supp. at 652 n.3. The court used the defendants' disputed calculations for the purposes of its order but held that the court's use of those calculations "does not imply final acceptance." *Id.*

Thus, what petitioners ask this Court to review is a non-final, non-preclusive jurisdictional finding incident to an order of remand for lack of subject matter jurisdiction which is unreviewable on appeal pursuant to 28 U.S.C. § 1447(d). Since the district court did not resolve the factual dispute concerning ownership interests nor make any factual findings, this Court could not review the matter even if an exception to section 1447(d) applied. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687 (1993) (appellate review is precluded of determinations which are "tentative, informal or incomplete").

The petitioners have not shown any real or intolerable conflict between the decision below and any opinion of other Circuits or this Court. The petitioners have not shown any important reason to do away with over 100 years of jurisprudence and carve out a broad exception to the well-established rule of unreviewability of remand orders in section 1447(d).

To permit appellate review here would all but eviscerate the rule, since under the petitioners' logic, all non-final, non-preclusive jurisdictional findings incident to remand orders would be subject to appellate review. Such review would surely increase the delays and protract the litigation over jurisdictional issues which it was the avowed purpose of section 1447(d) to resolve. *See Thermtron Products, Inc.*, 423 U.S. at 351.

The petitioners contend that Congress mandated a federal forum for suits against them. This contention is incorrect. The FSIA "clearly contemplates that such suits may be brought in either federal or state courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S 480, 489 (1983). As the Fifth Circuit held, the petitioners are free to raise the undetermined issue of FSIA immunity in state court on remand. The petitioners should do so, rather than attempt further resolution of the facts and legal issues before this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1994

AIRBUS INDUSTRIE, ET AL.,

Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. The Court Should Grant the Petition to Resolve Whether Section 1447(d) Applies to Deprive Foreign Sovereigns of the Right to Seek Review Under the Collateral Order Doctrine of an Erroneous Denial of Immunity from Suit Under the FSIA When the District Court Remands the Case to State Court.

The Respondents accuse the Petitioners of having mischaracterized the nature of the question presented by having suggested "that the district court below issued a separable order 'denying a party's claim of immunity from suit under the [FSIA].' " Br. in Opp. at 5 (quoting Pet. at i). The Respondents contend that the district court at no time denied the Airbus Defendants' claim to immunity from suit under the FSIA. They base this contention on the faulty premise that the FSIA Order determined only whether the district court had removal jurisdiction under the FSIA and not whether the Airbus Defendants were entitled to immunity from suit under the FSIA. Br. in Opp. at 3, 5, 9. The district court's own opinion and stay order belie such an argument.

In its order remanding the case to state court, the district court expressly recognized the separable nature of its substantive FSIA ruling when it distinguished between its order of remand, which it described as nonappealable, and its FSIA ruling, which it described as appealable: "As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ('FSIA')." Appendix B at B-11 n.12. Moreover, the FSIA Order was issued long before the order of remand. When announcing its decision that the FSIA did not apply to the Airbus Defendants, before the first appeal and long before the order of remand was entered, the district court expressed its view that the FSIA Order was final and appealable under the collateral order doctrine. Transcript of July 14, 1992 Hearing at 5 ("Simply put, that's an automatically appealable issue."). Thus, the argument that the FSIA Order applied only to the jurisdictional decision, given the facts of this case, is logically impossible.

Apart from the district court's view of its own actions, under the doctrine of merger, all nonfinal rulings, such as the FSIA Order denying the Airbus Defendants' FSIA status, become final when an order is entered terminating the federal proceeding. *E.g.*, *Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993); *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983). The district court's FSIA Order, by operation of the doctrine of merger, has now become a final order denying the Airbus Defendants' FSIA immunity.

Respondents also argue that once the district court determined that it had no subject matter jurisdiction, it had no authority to rule on the Airbus Defendants' substantive FSIA immunity defenses. Br. in Opp. at 9. In this case, however, the district court's holding that the Airbus Defendants were not entitled to FSIA status controlled the resolution of both the motion to remand and the motion to dismiss. Once the district court determined that the Defendants did not qualify for FSIA status, it necessarily and simultaneously determined that the Defendants did not qualify for FSIA removal (the remand motion) and FSIA immunity (the motion to dismiss). Accordingly, the proposition that the district court cannot make additional rulings after it determines that it has no jurisdiction has no application in this case. *See In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1192-93 (8th Cir. 1988).

II. The Court Should Grant the Petition to Resolve the Split in the Circuits Concerning the Application of the Separable Order Doctrine.

Although none of the cases cited in the Petition as conflicting with the Fifth Circuit's decision involved FSIA removal, there is a direct, real, and intolerable conflict among the circuits on the application of the separable order doctrine. The separable order doctrine followed in the Third, Ninth, and Sixth Circuits is much broader than the doctrine followed in the Fifth Circuit, and the result would have been different in these other circuits.

A. The *City of Waco* Exception Applies Since the Remand Order Is Conclusive.

The Respondents argue that the exception first announced in *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934), does not apply in this case because "there was no dismissed claim nor any order which 'in logic and in fact' was 'separable' from the district court's jurisdictional determinations regarding remand." Br. in Opp. at 9. Respondents also argue that the *City of Waco* exception does not apply because the district court's FSIA findings were jurisdictional and thus had no preclusive effect on the Airbus Defendants in this case. Respondents' reliance on these arguments is misplaced.

First, application of the separable order doctrine, which developed from this Court's *City of Waco* decision, does not require that a claim have been dismissed. Respondents cite no authority for that proposition, nor did they take that position before the Fifth Circuit in this case.

Second, as explained in the Petition, Pet. at 14-22, the district court's denial of FSIA immunity was "in logic and in fact" separable from the district court's jurisdictional determination.

Third, as explained in the Petition, the district court's remand order conclusively determined the Airbus Defendants' right to have the case dismissed for *forum non conveniens* since that defense cannot be asserted in Texas state court.[1] *See* Pet. at 13 & n.4, 16 & n.5. The remand order also conclusively determined the Airbus Defendants' right to a federal forum under 28 U.S.C. § 1441(d) and the FSIA, as well as the issue of removability itself. *See* Pet. at 13 & n.4, 16 & n.5. As the Third Circuit explained in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), the proper inquiry in determining whether a remand order is conclusive is whether the issue of removability is unreviewable on remand. Like *TMI*, the district court's refusal

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[1] The district court's remand order stated that if the court had not remanded the case to state court, it would have dismissed the case for *forum non conveniens*. Appendix B at B-11 n.12.

to assume jurisdiction conclusively determined the issue of removability. *Id.* Respondents make no attempt to respond to these arguments and instead merely focus on whether the Airbus Defendants can reurge their immunity claim in state court. Br. in Opp. at 10.

B. There Is No Legitimate Distinction Between *TMI* and This Case.

Respondents argue that the *TMI* case does not apply here because there is no finding of unconstitutionality. Br. in Opp. at 10-11. This is a distinction without a difference. Respondents make no attempt to explain why the unreviewability of findings of unconstitutionality – the factor that animated the Third Circuit's decision in *TMI* – is any less compelling or important than the unreviewability of erroneous interpretations of the FSIA. A determination that the FSIA does not apply to a foreign sovereign claiming FSIA immunity is no less important than a determination that a statute is unconstitutional.[2] As this Court has recognized, Congress' intent in providing foreign sovereigns an absolute right to remove actions against them was clear: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Indeed, given that a denial of a claim of immunity from suit is immediately appealable under the collateral order doctrine and that a determination of unconstitutionality is not immediately appealable, this case presents a more compelling reason to allow review as a separable order than did *TMI*.

Respondents attempt to show that the result would not have been different in this case in the Third Circuit by arguing that if the issue can be raised in state court on remand, the exception to section 1447(d)'s bar to review does not apply in the Third Circuit. *See* Br. in Opp. at 10 n.5 (citing *Carr v.*

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[2] For a full discussion of the importance of the FSIA, see subpart I(C) of the Petition.

American Red Cross, 17 F.3d 671, 675 (3d Cir. 1994)). Although in the Third Circuit's *Carr* decision whether the Red Cross was properly a party to the suit may have been conclusively determined by the district court's dismissal of the Red Cross and its remand to state court, the same cannot be said of the unconstitutionality finding in the Third Circuit's *TMI* decision – nothing precludes parties from reurging constitutionality issues in state court on remand. *See, e.g., Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 505 (Tex. App. – Austin 1991, writ denied) (Texas state courts are not bound by lower federal courts' interpretation of the federal constitution or federal statutes); 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-3 (1993) (law of the case typically applies to rulings by a superior court that bind an inferior court, *e.g.*, on remand from an appeal; interlocutory rulings of a federal trial court in cases remanded from state to federal court are not binding – the law of the cases doctrine is discretionary, a practical issue of case management).

C. The Result Would Have Been Different Under the Test Articulated by the Sixth and Ninth Circuits.

The Respondents argue that the Fifth Circuit's decision in this case does not conflict with the Ninth Circuit's decisions in *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985), and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984), or with the Sixth Circuit's decision in *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). While both *Pelleport* and *Regis* involved forum selection clauses, under the separable order doctrine articulated by those decisions, review would not have been barred in this case. For example, in *Regis*, the court stated that "a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Regis*, 894 F.2d at 194. Under this test, the remand order in this case was "based on a substantive decision on the merits of a collateral issue" – whether the Airbus Defendants were foreign sovereigns under the FSIA and thus

entitled to immunity from suit – "as opposed to just matters of jurisdiction." *Id.*

Likewise, in *Pelleport*, the Ninth Circuit based its conclusion that section 1447(d) did not preclude review on its finding that the remand order was based on a substantive determination affecting the rights of the parties. *Pelleport*, 741 F.2d at 277. Similarly, while in *Clorox* the remand order was based on the district court's belief that Clorox had waived its right to remove, the Ninth Circuit's holding that section 1447(d) did not bar review was based on its conclusion that a determination of waiver of the right to remove was a substantive decision on the merits apart from any jurisdictional decision. *Clorox*, 779 F.2d at 520.

III. The Fifth Circuit's Rule Has Already Produced the Anomalous Results That the FSIA Was Intended to Avoid.

In the Petition, the Airbus Defendants pointed out the bizarre results created by the Fifth Circuit's refusal to review underlying FSIA determinations when a case has been remanded to state court. Pet. at 23-24. In the first example, the Airbus Defendants pointed out that it is now the law that the Insurance Company of Ireland ("ICI"), the party claiming to be an agency or instrumentality of a foreign state in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993), is *at the same time* a foreign state in the Third Circuit and entitled to a federal forum, *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n.8 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994), but it is not a foreign state in the Southern District of Texas in the Fifth Circuit, *Mobil Corp.*, 984 F.2d at 666. *See* Pet. at 23-24.

The Respondents accuse the Airbus Defendants of having "fail[ed] to point out that in [*Texas Eastern*], ICI had been taken over by the Irish government while in [*Mobil*], ICI's acts occurred while it was still a private entity." Br. in Opp. at 13. Respondents are mistaken about the facts of the *Texas Eastern* case. In *Texas Eastern*, ICI was a private entity when the act occurred. *Texas Eastern*, 15 F.3d at 1238 ("ICI was a private entity when it entered into its insurance contract with TETCO,

but '[w]hen financial difficulties threatened in 1985, the Irish government moved to preserve the company.' ") (quoting *Mobil*, 984 F.2d at 665); *compare Mobil* 984 F.2d at 665 ("At the time of underwriting, ICI was not owned by the Irish government. When financial difficulties threatened in 1985, the Irish government moved to preserve the company."). Thus, in both cases, ICI's acts occurred when ICI was a private entity, and in both cases, the Irish government subsequently took over ICI. Accordingly, the results in the Third and Fifth Circuits with respect to ICI are anomalous.

In the second example, the Airbus Defendants pointed out that within the Southern District of Texas, Airbus is an agency or instrumentality of a foreign state in Houston, *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994), but that in Galveston, Airbus is not an agency or instrumentality of a foreign state, Appendix E at E-7 to E-8. *See* Pet. at 24.

The *Kern* case was a consolidated action of four cases: *Kern v. Jeppeson Sanderson, Inc.*; *Driessen v. Airbus Industrie (GIE)*; *Duhig v. Jeppesen Sanderson, Inc.*; and *Nordmann v. Airbus Industrie*. Respondents suggest that *Kern* is distinguishable given that in *Kern*, the Airbus Defendants presented the district court judge with a different time frame for calculating their ownership interests. Br. in Opp. at 13. Although a different time frame was applicable to the consolidated cases in the *Kern* proceeding, as to three of the consolidated cases, this distinction is relevant, but as to the fourth, the *Nordmann* case, the distinction is irrelevant. As the briefing in the *Nordmann* case demonstrates, *Nordmann* presents the same legal issue as this case – whether the German interests owned through Deutsche Airbus GmbH could be included. To have held that Airbus was a foreign sovereign, the *Kern* court necessarily accepted the tiering of the German interests. *See* Airbus Defendants' Motion to Dismiss and, in the Alternative, Motion for More Definite Statement, filed in *Nordmann v. Airbus Industrie*, No. G-93-610, consolidated with *Kern*, No. H-93-3065, S.D. Tex., at 10-13, 12 n.5 (explaining that unlike the other cases consolidated into the *Kern* proceeding, the *Nordmann* case presented the same legal issue that was before the district

court in *Linton*). Accordingly *Kern* (at least as to *Nordmann*) is absolutely indistinguishable from this case, and the net result is that Airbus is a foreign sovereign in Houston but, 40 miles away in Galveston, in the same district, it is not.

IV. Final Resolution of Disputed Fact Assertions About the Foreign Ownership Interests of the Airbus Defendants Did Not Preclude the Fifth Circuit from Resolving the Issues Presented on Appeal, and They Do Not Preclude This Court from Determining Whether the Fifth Circuit Erroneously Refused to Exercise Jurisdiction.

The Respondents also suggest that this Court should refuse to grant the writ because the FSIA Order "never made a final factual resolution of the asserted ownership interests," and that this Court therefore "could not review the matter even if an exception to section 1447(d) applied." Br. in Opp. at 14. This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), refutes this argument and the Respondents' attempt to characterize this case as turning on its own facts. In *Mitchell*, this Court explained that a trial court's determination that a defendant is not entitled to immunity from suit which is based on an assumption that the facts asserted by the defendant are true, is a final, appealable decision under the collateral order doctrine: "In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune." *Id.*

As in *Mitchell*, in this case, the district court accepted as true for the purposes of the FSIA Order the assertions made in an affidavit presented by the Airbus Defendants and ruled that, as a matter of law, the Airbus Defendants were not foreign sovereigns. Appendix E at E-4 n.3. On appeal from the FSIA Order, the sole issue is whether the district court properly interpreted the FSIA. Accordingly, unresolved factual disputes did not preclude the Fifth Circuit from resolving whether the district court erroneously interpreted the FSIA. Moreover, these factual disputes have no bearing on whether this Court can or should exercise its certiorari jurisdiction to address

whether the Fifth Circuit should have exercised its jurisdiction over the appeal.

V. The Fifth Circuit's Improper Application of Section 1447(d) to Bar Review of a Denial of a Claim of Immunity from Suit Under the FSIA Defeats the Policy of the FSIA.

The Respondents attempt to minimize the strong congressional policy behind the FSIA by pointing out that the FSIA contemplates that suit may be brought in either federal or state courts. Br. in Opp. at 15. Although plaintiffs are free to bring these claims in either forum, this argument ignores the clear congressional intent that foreign sovereigns be given the right to a federal forum should a plaintiff choose to bring suit in a state forum. *See* Pet. at 22-25. Because under the Fifth Circuit's decision determinations of FSIA status are only reviewable if the plaintiff chose a federal forum initially, the decision gives plaintiffs a litigation advantage by filing in state court and promotes forum shopping.

VI. The District Court's Underlying Denial of Immunity from Suit Under the FSIA Was Erroneous.

The Respondents attempt to characterize Petitioners' arguments that the FSIA Order was erroneous as "depend[ing] upon a convoluted three-tiered formula." Br. in Opp. at 2. The Fifth Circuit, although it found that it had no jurisdiction to consider the underlying FSIA issue, stated that "the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity." Appendix A at A-12. The Fifth Circuit also expressly criticized the district court's holding and suggested that the Airbus Defendants' position that the FSIA permits both pooling and tiering was correct. *Id.* at A-12 to A-13 n.28. Respondents make no attempt to refute the Fifth Circuit's reasoning or to show how the FSIA places any restriction on the manner in which foreign state ownership must be held.

After Petitioners filed their petition for a writ of certiorari with this Court, the Fifth Circuit issued its opinion in *Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205 (5th Cir. 1994). In *Mangattu*, the district court found that appellee, which was wholly owned by six

foreign sovereigns, was a foreign state under the FSIA. *Id.* at 206-07. The Fifth Circuit rejected appellants' argument in that case that the FSIA "requires that 51% or more of appellee's stock be owned by a single foreign state, and that several foreign states cannot pool their ownership interests," *id.* at 207, and held that pooling is permitted by the FSIA, *id.* at 207-08.

CONCLUSION

For these reasons, as well as the reasons set forth in the petition for writ of certiorari, Petitioners respectfully request that the Court grant the petition for writ of certiorari and that the Court grant all relief requested in the petition for writ of certiorari.

Respectfully Submitted,

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